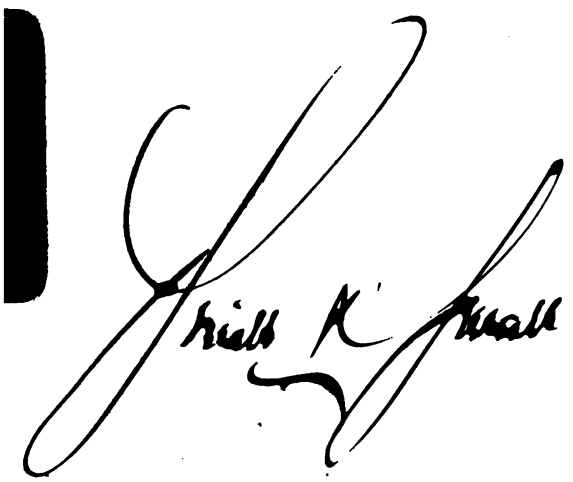

LAW

A HANDBOOK

OF THE

SHERIFF AND JUSTICE OF PEACE SMALL DEBT COURTS

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SHERIFF AND JUSTICE OF PEACE SMALL DEBT COURTS

WITH

NOTES, REFERENCES, AND FORMS

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PREFACE.

DURING the half-century that has elapsed since the Small Debt Acts were passed, many important judgments have been pronounced in regard to their scope and interpretation; and much valuable instruction has been furnished by experience of their working. But these decisions are, unfortunately, scattered among many volumes and sets of reports, some of which are not everywhere readily accessible; while the products of experience have probably been most valuable where they have been most copious. It seemed to me, therefore, that if I were to collect these decisions, and commit to writing the fruits of such experience as I possessed, or as were available to me, in regard to the practical working of the Small Debt Acts, I might to some extent facilitate and harmonise procedure, which it is urgently desirable should, in Courts at once so popular but so little regulated by appeal, be as nearly uniform as possible. In furtherance of this object I have supplied a great variety of Forms for the convenience of agents, officers, and parties, and have by cross references to the Sheriff Small Debt Act, by explanatory notes, and by a popular introduction, specially sought to make the work of service to the occupants of the Justice of Peace Bench.

SHERIFF CHAMBERS, GLASGOW,
June 1884.

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Bell App. . .	Bell's House of Lords Appeal Cases.
Bell Pr. . .	Bell's Principles of the Law of Scotland.
Broun . .	Broun's Justiciary Reports.
Coup. . .	Couper's Justiciary Reports.
D. . . .	Shaw & Dunlop's Court of Session Reports, 2d Series.
F. C. . . .	Faculty Collection of Decisions.
Guth. . .	Guthrie's Select Sheriff Court Cases.
H. L. . . .	House of Lords.
Hume . .	Hume's Decisions of the Court of Session.
Irv. . . .	Irvine's Justiciary Reports.
J. . . .	Scottish Jurist Reports.
J. C. . . .	Justiciary Cases.
J. of J. . .	Journal of Jurisprudence.
J. P. . . .	Justice of Peace.
J. Shaw . .	J. Shaw's Justiciary Reports.
M. . . .	Macpherson's Court of Session Reports, 3d Series.
Mackay . .	Mackay's Practice of the Court of Session.
Moncreiff . .	Moncreiff on Review in Criminal Cases.
Mor. . . .	Morrison's Dictionary of Decisions.
R. . . .	Rettie's Court of Session Reports, 4th Series.
S. . . .	Shaw's Court of Session Reports, 1st Series.
S. D. . . .	Small Debt.
S. L. R. . .	Scottish Law Reporter.
Scot. Law. Journ.	Scottish Law Journal.
Scot. Law Mag.	Scottish Law Magazine.
Sellar . .	Sellar's Judicial Forms of the Sheriff Court.
Wilson . .	Dove Wilson's Sheriff Court Practice

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INTRODUCTION.

§ 1. USEFULNESS OF SMALL DEBT COURTS.—There are probably no tribunals in Scotland more generally useful and popular than the various Small Debt Courts. During the year 1882 there were in dependence in 105 Sheriff Small Debt Courts 54,874 cases, exclusive of 3834 cases of summary removing; and in 37 Justice of Peace Small Debt Courts 16,731 cases. Many thousand cases probably would, in the same time, be before the various burghal Small Debt Courts. The average value of the 54,874 cases was about £4, 6s. 10d., and of the 16,731 cases, £1, 15s. 3d. The total value of the former was over £238,000; of the latter, over £29,000; and of both combined, about £268,000.

§ 2. To a great extent the Small Debt Courts owe their popularity to their easiness of access, to their cheap and simple procedure, and to the finality of the judgments pronounced. But the policy of the Legislature, in imposing restrictions in the matter of expenses on parties who raise actions in higher Courts which could have been raised in the Small Debt Courts, helps in some degree to increase the number of cases. On the other hand, the statutory provision which wholly excludes lawyers from pleading in the Justice of Peace Small Debt Court, and only allows them to appear in the Sheriff Small Debt Court with the judge's leave, and thus denies to a party the right to have his lawyer's aid in a court of law, can hardly fail to deter many persons from insisting on payments to which they are justly entitled. As, however, not only agents, but even counsel, can appear in the corresponding

English Courts, and as the Royal Commission on the Scotch Courts of Law recommended in their fifth report, in 1871, that this anomalous restriction should be abolished, it may be expected that it will not long be allowed to continue, and that the rolls of the small debt business will get even larger than they now are. The despatch of the Small Debt Courts constitutes a strong attraction to parties interested in shipping cases; and in seaport towns a very considerable proportion of the business of the Courts consists of these complicated and important actions. Claims for wages and petty accounts, by servants and small tradesmen, are throughout the whole country a material source of small debt litigations; and indeed to people in that class of life the Small Debt Courts are practically almost the only civil courts known.

§ 3. UNIFORMITY OF PROCEDURE DESIRABLE.—Such considerations obviously make it desirable that the procedure in the various Small Debt Courts of the country should be as nearly uniform as possible. It is now about half a century since the existing Small Debt Acts were passed, and, in the interval, many authoritative and instructive decisions have been pronounced by the Courts of Appeal, which have elucidated the principles on which the Small Debt Courts act; while the experience of busy local tribunals has accumulated a large amount of information in regard to the details and working of the system, which it is perhaps not undesirable should find expression in print.

§ 4. It will be remembered that the Royal Commission on the Courts of Law in Scotland suggested in their fourth report, in 1870, that the procedure in the Sheriff and the Peace Small Debt Courts should be assimilated. At present, though somewhat similar, it is far from identical; but even where the two systems differ, the one throws an instructive light on the other. It seemed expedient, therefore, to combine any treatise on the administration of justice in the respective Courts; and this course, while it possesses the advantage of much economy of space, is at the same time a convenience to a party who may be a litigant one day in the one Court and another in the other.

§ 5. ORIGIN OF SMALL DEBT COURTS.—Of the various Small Debt Courts in Scotland, the oldest would seem to be the Burgh Small Debt Court, or Bailie Court, as it is often termed. It is uncertain when this Court was instituted; but it plainly is not the creature of legislative enactment, and doubtless owed its origin to the fact that the civic magistracy were looked upon as the representatives and executive of the citizens at large. This Court is recognised in statute as an existing Court nearly three centuries ago. It is matter of familiar knowledge that in every district of Scotland justice was administered by or on behalf of the local chiefs; and the Barony and Regality Courts exercised a not unimportant jurisdiction in many places till a comparatively recent time. Cromwell fixed the jurisdiction of the former at forty shillings, and their continuance was sanctioned under the Heritable Jurisdiction Act of 1747.

§ 6. Some of these Courts still survive, exercising, like the various Burgh Courts, a small debt jurisdiction to the amount of forty shillings. In Edinburgh there also still exists a quaint old Court called the Ten Merk Court, in which cases to the amount of 11s. 1½d. are disposed of by the Bailies on a verbal warning to the defender to appear given by the bar-officer; but the decree in the cause cannot be enforced in any other county, and the poinding authorised by it can, it is understood, only be executed in Edinburgh itself. Practically speaking, as the Burgh Small Debt administration is similar to that of the Justice of Peace Small Debt Court, though of smaller amount, it is sufficient to confine attention to the Justice of Peace and the Sheriff Small Debt Courts.

§ 7. ORIGIN AND OUTLINE OF PEACE SMALL DEBT COURT.—The older Court of the two is the Justice of Peace Court. Under an Act passed in 1795 (35 Geo. III. cap. 123), a Small Debt jurisdiction to the extent of forty pounds Scots (£3, 6s. 8d.) was conferred on Justices of Peace. The utility of the Court led to an Act being passed in 1800 (39 & 40 Geo. III. cap. 46), by which their jurisdiction was extended to £5, and various improvements were made in the mode of its administration. In 1825 a third

Act was passed (6 Geo. IV. cap. 48), which, except in so far as amended by the Act 12 & 13 Vict. cap. 34, is the code of the procedure in the Justice of Peace Court. Under that statute any two or more Justices of the Peace in any county are authorised to "hear, try, and determine, as shall appear to them agreeable to equity and good conscience, all causes and complaints brought before them concerning the recovery of debts, or the making effectual any demand, . . . in a summary way . . . that . . . shall not exceed the value of five pounds sterling, exclusive of expenses."

§ 8. The defender is to have a copy of the complaint and claim served on him, and if he does not appear at the appointed diet, personally or by some competent representative, decree is to be pronounced against him. He may, however, on consigning the amount decerned for, get execution of the decree sisted till the case can be heard. On the decree becoming final, it is to be enforced by arrestment or poinding,—imprisonment being now practically incompetent. The decree cannot be appealed against or reviewed in any way, except by an action of reduction raised in the Court of Session within a year from its date, and only on the ground of malice and oppression on the part of the Justices.

§ 9. ORIGIN AND OUTLINE OF SHERIFF SMALL DEBT COURT.—The first Sheriff Small Debt Act was passed in 1825 (6 Geo. IV. cap. 24), at the instance of Mr Home Drummond, M.P. for Stirlingshire, and the maximum amount that could be sued for was fixed at £8. In 1829 an amending statute (10 Geo. IV. cap. 55) was passed, also at his instance, under which the jurisdiction was extended to a hundred pounds Scots (£8, 6s. 8d.); and in 1837 the subsisting Act, 1 Vict. cap. 41, received the sanction of the Legislature, chiefly at the instance of Mr Wallace of Kelly, M.P. for Greenock. By this statute the prior legislation was repealed, and the whole procedure was amended and codified. The jurisdiction, though otherwise enlarged, was not increased in the matter of pecuniary amount; but by a subsequent statute passed in 1853 (16 & 17 Vict. cap. 80), it was raised to £12. In certain cases

(see note (*g*) to section II.) the amount may be greater; and where both parties wish it, cases of any value can be brought from the Ordinary Court and tried under the Small Debt forms.

§ 10. The machinery provided by the Act of 1837 still subsists. The defender is summoned to appear at a specified Court six days at least after his citation. If he fails to appear, decree is pronounced against him with expenses; but on consignation of these expenses and ten shillings to meet further expenses, he has the privilege, at any time before he is charged to implement the decree, or within three months after such charge if implement has not followed, of sisting execution of the decree and of having the case gone into. A pursuer has a similar privilege within the month following a decree absolvitor pronounced in his absence. The decree of the Court is enforced by arrestment or poinding,—imprisonment being practically incompetent.

§ 11. The pursuer can also take the precaution, on raising his action, to arrest his debtor's money or effects in any part of Scotland; and when he has got decree for his debt, he can bring an action of furthcoming in the Small Debt Court within whose jurisdiction the arrestee resides. If more claims than one are made on the arrestee, he can protect himself, and get rid of the money or goods held by him, by raising an action of multiplepoinding; or it can be raised in his name by any of the claimants. A landlord is enabled to sequestrate his tenant's effects for past due rent; and now he can also do so in security of the rent to become due.

§ 12. To extend the usefulness of the Court as much as possible, each Sheriff has to hold certain Circuit Courts throughout the Sheriffdom; while the judgments he pronounces are excluded from all review, except by the Court of Justiciary, and only when the appeal is founded on the ground of corruption or of malice and oppression on the part of the Sheriff, or on deviations from the statutory enactments which occurred wilfully or prevented substantial justice from being done, or on incompetency, including defect of jurisdiction. Certain preliminary requisites have to be complied with before the appeal can be entertained. These matters will be found

dealt with under sections XXX. and XXXI., and the notes appended thereto.

§ 13. DIFFERENCES BETWEEN THE TWO COURTS. —There is a considerable number of differences between the procedure and capacity of the Sheriff and the Justice of Peace Small Debt Courts, but the most material are probably the following:—

Justices of Peace are a purely statutory body, and have and can exercise no jurisdiction other than what the statute under which they meet, or which they are at the time administering, expressly confers. Hence, in the exercise of their Small Debt jurisdiction, they have been rigidly restricted to the words of the statute as to the nature and value of the cases competent before them. On the other hand, the Sheriffs, being common law judges, are held to exercise in the Small Debt Court only their ordinary jurisdiction, under certain statutory provisions; and accordingly, the £12 limit provided in the Sheriff Small Debt Act has, in decision and in practice, received a more liberal construction than the limit provided in the Peace Small Debt Act, and has thus been made to include a wider area of cases, and to be proportionately of much more general use to the lieges. In fact, as pointed out by the Court of Justiciary in the case of *Nixon* v. *Caldwell*, if the sum sued for is not over £12, the action must be assumed to be competently brought in the Small Debt Court till the contrary is established. The whole matter will be found discussed in notes (*c*) and (*f*) to section II.

§ 14. In the Peace Small Debt Court a party who has occasion to sue in a Small Debt Court twenty miles distant from his home, is entitled to appear by a mandatary; in the Sheriff Small Debt Court he has no such privilege. In the former tribunal a witness who does not appear must be cited again, six days at least before the diet, in order to compel his attendance; the latter tribunal can have him apprehended at once.

§ 15. The decree granted in absence against a defender by the Justices cannot be sisted by him after the expiry of the days of charge, or without consignation of the sum de-

cerned for, or if he was represented by a member of his family. But the Sheriff's decree can be sisted by a defender on consignation of the expenses merely, and till the charge be implemented, or till three months after it have expired, and even though he was represented in Court by a member of his family.

§ 16. In the Peace Small Debt Court the defender is not entitled to be heard, though it be only to ask time to pay the debt, till he pays sixpence, as a fee of Court; and each party has to pay so much for each witness examined. In the Sheriff Small Debt Court the defender is under no such restriction, and no fees are payable in Court in respect of evidence.

§ 17. In the Peace Small Debt Court the defender is given no facilities for bringing a counter-claim; in the Sheriff Small Debt Court a counter-claim of any kind can be brought. But in both Courts the defender is entitled, if he choose, to present his counter-claim as a substantive action,—the difference in result being, if he is successful, that he gets a decree for the claim made by him in a counter-action; but the amount of a counter-claim is only a deduction from any sum to which the pursuer is found entitled.

§ 18. The decree of the Justices can be enforced by immediate sale after the poinding; but the costs are about twice as great as in the Sheriff Court; and that tribunal has no power to secure the creditor by allowing him to arrest on the dependence of his action, nor to entertain an action of multiplepoinding nor of sequestration for rent. In the Sheriff Small Debt Court the debtor's effects cannot be sold under the decree without forty-eight hours' notice to him; but on the dependence of the action arrestment of the defender's goods and funds can be used in any part of Scotland, and landlords can sequestrate in security or in execution, and multiplepoindings can be brought.

§ 19. The Justice of Peace Small Debt Act has no provision for actions of furthcoming, or for the allowance of expenses to a successful defender. But, arrestment on the decree being competent, justice is more or less attained by a second action being brought for the sum already decerned for

and the arrestee being called as a defender, and decree given against him, and the common debtor this time assoilzied or the action *quoad* him dismissed; and an unsuccessful pursuer is at times prevailed on to pay a specified sum to his opponent by the threat that if he does not do so, an action will be brought for it and decree given. This is undeniably not very convenient procedure, and if the pursuer does not reside within the Court's jurisdiction, not very efficacious; for in such a case the threatened action would have to be brought in a different Court. The fact, therefore, that the Peace Small Debt Court has so considerable an amount of business, and that such amount is not diminishing, but rather increasing, speaks well for the acceptability of the Court to those members of the community who have small claims to enforce.

§ 20. By the Sheriff Small Debt Act it is provided that, if a pursuer abstains from claiming any portion of a debt of the same kind as that he is suing for, he is to be held as having abandoned such portion. But in the Justice of Peace Small Debt Court there is no similar provision; and unless the Justices think fit to apply some such rule, if in their opinion the state of circumstances warrants it, there is nothing to prevent a pursuer bringing actions for as many sums of five pounds as there are accounts owing to him.

§ 21. In the last place, it is to be noticed that in the Sheriff Small Debt Court an agent may be allowed to appear on behalf of his client; but in the Justice of Peace Small Debt Court, strictly speaking, he cannot; and while on over 12,000 occasions during 1882 parties were represented by agents in the Sheriff Small Debt Court, such a course was followed in only about 370 instances in the Peace Small Debt Court,—with the result that in the Court where their presence would have been most useful it least often occurred. There is always the remedy, however, that a party may put a penny stamp on his claim, and write on it "pay the above claim to" his lawyer, which gives the latter a right to appear in his own behalf (*Kay* v. *Begg & Balfour*, 26 Jan. 1837, 15 S. 422; 9 J. 230; *Ritchie* v. *M'Lachlan*, 27 May 1870, 8 M. 815; 42 J. 477).

§ 22. THE FORUM.—If, therefore, a party has a claim which does not exceed the statutory £12 or £5, or which he is willing to restrict to one or other of these amounts, and which can competently be enforced by the Court, his remedy is to apply to the Clerk of Court, or his representative, within the jurisdiction where the defender resides, for a summons, which is to be filled in with a statement of the ground of action according to the directions of the statute, and of which a number of examples have been given in the notes to Schedule A, No. 1, of the Sheriff Small Debt Act. By the residence of the defender is meant the place where he usually resides, and not the place where he carries on business,—unless the defender be a company,—or where he is resident only temporarily.

§ 23. If a party has left his residence for more than forty days with no intention of returning, he cannot be cited there, unless he is keeping on the house for his family. On the other hand, if the defender be some itinerant who has no fixed residence or domicile, as it is termed, he may be sued before any Court within whose jurisdiction he is found, if he be personally cited. If the action is one of furthcoming, though the debt was constituted in the county in which the debtor resides, the furthcoming must be brought in the county in which the arrestee resides. While, if the action be a multiplepoinding, it must be brought within the jurisdiction to which the holder of the fund is subject.

§ 24. THE DESIGNATION OF THE PARTIES.—It is necessary that the character in which the parties sue and are sued respectively be sufficiently and correctly set forth. A person may have funds for which he is liable to account partly as an individual, partly as a trustee, partly as an executor, partly as treasurer of some association, and so on; and, on the other hand, the pursuer's right to claim it may depend on some particular character or right he possesses. It is proper, therefore, first to give the ordinary or individual designation of each party, and then to add to it the description of the special character in which the person sues or is sued—*e. g.*, John Smith, accountant, 411 Nottingham Road, Glasgow, trustee on

the sequestrated estates of Hugh Wilson, grocer, 23 Pilrig Street, Partick. This shows who the pursuer is, and in what character he sues.

§ 25. There are about three hundred ordinary phases in which a person or body of persons may sue or be sued; but it would be out of place to enter on any disquisition on the matter here. Most of them can be easily enough specified; and a full list of examples of them will be found, if needed, in Part II. of my 'Handbook of Styles.' A few of the more common and important may, however, be here briefly described.

(*a*) *Child.*—A boy under fourteen, or a girl under twelve, sues or is sued in name of its father or other legal guardian on its behalf.

(*b*) *Minor.*—Thereafter, and till twenty-one is attained, the young person can sue or be sued alone; but if the father or other legal guardian is alive, he must in general be, or be called as, a party to the action as curator of the young person.

(*c*) *Wife.*—If the wife is suing or being sued only for what concerns herself, her husband will be set forth or called as her curator; but where he has an interest in the matter, he will be called as a party for his own rights. Where, however, the wife is living apart from her husband, or is suing him, or has an order of protection, she can sue alone; and even when she is living with him, she can sue alone in regard to any separate business she carries on.

(*d*) *Assignee, Executor, Trustee, &c.*—Such parties must trace their title to sue on behalf of the person or persons in right of whom they sue.

(*e*) *Association or Society.*—If incorporated, it sues in its corporate name, specifying in general the mode of its incorporation and its registered office. If registered under the Friendly Societies' Act, it sues in name of its trustees, or the persons authorised by its rules to sue on its behalf, and may be sued in name of any officer or person who receives contributions or issues policies on behalf of the Society within the jurisdiction, adding thereto the words "on behalf of the, &c., Society." If the association is formed at common law, it must sue or be sued through its trustees, if it has any, and if

the matter be one in which they represent it; or, otherwise, in name of the whole or a majority of its members. In some instances a committee or special representative has been recognised, but such a mode is attended with some risk. As between the Society and its members, the action may always be brought in the manner in which its rules provide.

(*f*) *Company.*—If incorporated, it sues in its corporate name. If not incorporated, then, if the company has only a descriptive name—*e.g.*, The Paisley Plaid Company—it sues in the name of the company and three partners, if there are as many; but if it is a proper firm—*e.g.*, Jones & Smith, photographers, Gallowgate, Glasgow—it is sufficient to sue in the name of the firm, but the names of the partners may be added, if wished, and must be if the company is dissolved and is being sued. Where the company has trustees, it can sue in their name in a matter falling within their control.

(*g*) *Local Authority.*—If it is incorporated under any special name, it will of course sue under it. If it is not, but if it is itself a corporate body—*e.g.*, a town council, or a local authority under the Public Health Act, &c.—it will first set forth its corporate name or style, and add "being the local authority constituted and acting under," &c. If it is not an incorporated body, it will make the same addition to its common law designation as an association.

(*h*) *Parochial Board.*—The inspector sues in his own name on behalf of the Board, and it is desirable that he should add he is suing for their behoof.

(*i*) *Police Commissioners.*—For the recovery of assessments, their collector sues in his own name on their behoof, adding his official to his ordinary designation. In any other matter relative to the execution of the Act, the Commissioners can sue similarly through their clerk. For general purposes in suing, the Commissioners must be enumerated and designed, adding the name of the official body that they compose.

(*j*) *Road Trustees.*—County Road Trustees sue in that name, specifying the county; or rather the County Road Board will, unless such power be withheld, sue in their name. Burghal Road Trustees sue in the manner specified in regard to other local authorities.

(*k*) *School Board.*—It is a body corporate and sues in its own name—*e.g.*, the School Board of the parish of Campsie.

(*l*) *Town Council.*—If the burgh is incorporated under statute or charter, or is a Parliamentary burgh, the Council sue as a corporate body—*e.g.*, the Magistrates and Town Council of the burgh of Dysart,—or in such manner as their Act directs; if otherwise, the members will be enumerated and designed, and the name of the official body they compose added.

§ 26. ERROR IN THE DESIGNATION.—It is important to see that the designation of the parties is correctly given, for if a material mistake be made, the action may have to be thrown out, and if injury has been suffered, an action of damages may follow. On the other hand, it is not necessary to be deterred from proceeding with an action where the party brought to the Court is the proper defender and has been personally cited. Thus, where a Mrs Barbara Petrie or Spalding applied for interdict against the sale of her effects, which had been poinded under a decree in absence obtained in the Small Debt Court against Mrs Grace Spalding, the Court refused to intervene, seeing that her address and her business were correctly specified, and that she had been personally cited, and did not deny that the debt was owing. In another case in which a wrong street had been given as the place of the defender's residence, the Court refused to intervene. So also where John Turnbull & Co. were cited instead of Turnbull & Co., and where Charles Kean was cited instead of George Robert Keene. These cases will be found more fully noted under note (*d*) to section XXX.

§ 27. But it is important to keep in view that what these cases settle is that the Supreme Court will not interfere by way of suspending or reducing the decree, or preventing diligence from following on it, or by giving damages; but the Inferior Court, though it will derive much guidance from these decisions, will not be precluded by them from giving effect to any objections of that kind which it may think cannot be repelled without injustice. In none of the cases to which I have referred was the judgment of the Inferior Court invited in regard to the misnomer; and, in part, the Supreme Court

acted on the view that the parties who invoked their aid had gone wrong in not bringing the matter directly or by sist before the Inferior Court. As pointed out more fully in note (*c*) to section VI., it is essential in laying on an arrestment to design the arrestee sufficiently and correctly, for if a mistake be made it cannot be corrected in the action of furthcoming which is intended to follow.

§ 28. THE GROUND OF ACTION.—The summons should state shortly the origin of debt or ground of action. This may be done either on the blank space in the summons itself, or in an account or statement annexed to the summons. See in regard to this more fully notes (*c*) and (*i*) to section III. The Sheriff Small Debt Act requires the last date of the account or ground of action to be given, and it is obviously expedient that this should be supplied, for otherwise the defender might not know when the claim was supposed to have arisen, and the Court would not see whether prescription had run or not. A considerable number of examples will be found under the notes to Schedule A, No. 1, of the Sheriff Small Debt Act, of the forms in which such claims may be stated; and though it may be doubted whether it is necessary to libel the claim as scrupulously as in an action in a higher Court, it is certainly necessary that the case must set forth facts which would justify an action in more formal style.

§ 29. In some actions, for example, those in which the defender is in a position where he can plead privilege, it is necessary to prove that in what he did he acted maliciously and without probable cause. Strictly speaking, such words should be in the complaint; but it is thought that if the averments made would justify the use of the desiderated words of style, there is no sufficient reason for refusing to let the case go to probation. If, however, the employment of agents comes to be legalised, a more stringent rule might require to be followed.

§ 30. On the other hand it is clear that where more defenders than one are called, none of them can be held liable to any greater extent than his own proportion of the sum claimed, unless the defenders are sued "jointly and severally"

or in some such way. The test of such a view is this—that the reason of a defender for not appearing might be that he was content to pay his share, but would have contested the case if more had been asked. Therefore in suing on a bill, or for an assault, or in any other form of action in which each defender is liable *in solidum*, joint and several liability should be expressly averred.

§ 31. PREPARATION FOR THE HEARING. — Considering the peremptoriness of the diet in a Small Debt Court, and that no record is preserved of the evidence, it is obviously important that each party should be thoroughly prepared to prove his own averments, and meet the case which the other makes, or may be expected to make. It is often vexatious to bring a lot of witnesses who may not be needed; but the difference between their presence and their absence may mean the difference between winning and losing the action; and if the case is won, the other party will probably have to pay their expenses.

§ 32. For the like reason care should be taken by each party to have with him any receipts, or agreements, or accounts, or other documents, especially letters, in which any admissions are made by his opponent bearing on the case. He should also, in a mercantile matter, have his books with him; for, though they will not by themselves win the case, nor his oath by itself, yet, if the books are apparently carefully and regularly kept, they may, as corroboration of his oath, lead to a decision in his favour. If the action is laid on a pass-book, the pursuer should see to have evidence with him that there was a pass-book; for if the defender deny it, and its existence be proved, the pursuer's oath, with even slight corroboration as to the amount, will probably turn the scale in his favour. Therefore, even where the action is laid per pass-book, a pursuer will do well to have his books with him. If the last article in the account has been supplied more than three years ago, the pursuer can only prove his debt by the writ or by the oath of the defender. See in regard to this more fully note (*c*) to section XIII.

§ 33. CITATION OF PARTIES, WITNESSES, AND HAVERS.—A warrant of service is granted by the clerk in name of the Court, and the pursuer's officer serves a copy of the summons and of the claim or account on the defender. It is not necessary that the execution by the officer should bear that a copy of the account was served on the defender, but it must be served all the same. The service may be made on the defender personally, wherever he is found, or if he is not in his house, the citation can be left for him there with one of his family, or sent to him by a registered letter. The provisions applicable to service will be found detailed under note (*j*) to section III. If the officer does not return an execution of his service, he will have to attend in Court and prove the service by his oath. Unless in charging, poinding, or sequestrating, he does not require to be accompanied by a witness.

§ 34. The warrant granted to the pursuer authorises his officer to cite witnesses and havers also. They may be cited at any time before the diet for hearing the cause; but if they do not attend, they are not liable to any penalty, unless the citation was timeous. Thus in the Sheriff Small Debt Court, unless they get at least forty-eight hours' notice, they are not liable to the statutory penalty of 40s., or to have letters of second diligence issued against them; and in the Peace Small Debt Court a recalcitrant witness, even though cited a second time, does not incur the penalty of 20s. or ten days' imprisonment, unless the citation was given at least six days before the diet of Court. Forms for citation in common form are given at the end of the respective Acts; and in the notes to Schedule A of the Sheriff Small Debt Act will be found suggested examples of citation by registered letter, under the Citation Amendment Act of 1882, of parties, witnesses, and havers, and of the executions of intimation following thereon.

§ 35. SISTING EXECUTION OF THE DECREE.—If the pursuer failed to be present or to answer to his name when the case was called in Court, and in consequence decree was pronounced in favour of the defender, he can at any time within a month thereafter, on consigning two shillings and

sixpence with the Clerk of the Peace Small Debt Court, or the expenses awarded to the defender and five shillings more with the Clerk of the Sheriff Small Debt Court, get execution of the decree sisted till the case is heard. Similarly a defender can, if necessary, at any time before the days of the charge expire, on consigning the sum decerned for with the Clerk of the Peace Small Debt Court, obtain a sist. In the Sheriff Small Debt Court he requires to consign only the expenses awarded and ten shillings more to meet further possible expenses; but he may sist at any time during three months after the charge, unless the decree has been implemented by poinding, or imprisonment, or payment to any extent. The same party cannot obtain a second sist unless the case has got into a different stage. See more fully as to this, note (*s*) to section XVI. But the other party may have one sist also. The expenses of the day the party sisting was absent go to his opponent.

§ 36. ENFORCEMENT OF THE DECREE.—If decree is pronounced the Court can decern for the whole amount, or for any part, or for payment by instalments. The circumstances and conditions under which such indulgence should be granted will be found considered under notes (*a*) and (*c*) to section XVIII. But as the matter will be dealt with on the spot, a pursuer should in general come prepared with some knowledge of his debtor's earnings and requirements. Indeed if he has reason to expect that the defender's attendance at Court will be only to get leave to pay by instalments, and that his circumstances make the request not unreasonable, it may be prudent to arrange with the defender beforehand, so as to save his coming to Court, and possibly raising objections which he would not otherwise take.

§ 37. If the defender is not personally present in the Sheriff Small Debt Court, or personally or by a member of his family in the Peace Small Debt Court, a charge must be given to him to pay the sums decerned for. If he fails to pay within ten days thereafter, his goods may be arrested or poinded, and in certain cases (see note (*i*) to section XIII.) he may be imprisoned. When the money or effects of the debtor are arrested, payment

is enforced by an action of furthcoming. The means by which the debtor can get the arrestment loosed are set forth in section VI.

§ 38. APPEAL.—If a defender lets decree pass in absence for some debt in regard to which, or to the procedure for obtaining payment of which, he has objections, he must, as pointed out in § 27, sist the decree, and not resort to other remedy. Appeal or review of a judgment pronounced in the Sheriff Small Debt Court is only competent on limited grounds. These have been detailed in § 12; and the requisites of appeal against a Sheriff's judgment in the Small Debt Court will be found at length in notes (*f*) and (*r*) to section XXXI. Notes (*c*) and (*e*) to section XXX. may also be consulted. A Justice of Peace Small Debt decree cannot be appealed against; but it may be reduced within a year by action in the Court of Session if it be proved that the Justices acted maliciously and oppressively,—see section 14 and notes. Such is the natural course of an action in the Small Debt Court; but some incidental points which at times occur may be shortly adverted to.

§ 39. ADJOURNMENT.—The Sheriff Small Debt Act authorises a Sheriff to adjourn a case from his Ordinary to his Circuit Court, or *vice versa;* and both he and the Justices can adjourn the case to another sitting, when they think the ends of justice require it. It is obviously desirable that such adjournments should not be encouraged; and it is recommended that where the adjournment is caused by the fault of a party, or is granted to suit his convenience, the Court should impose an amand equal at least to the expenses of the other party for that day, and to be paid to such other party before the case goes on at the adjourned diet, or if not so paid, added to his expenses, if he be successful, or deducted from them if he be unsuccessful.

§ 40. AMENDMENTS.—Opinions differ as to the power of the Court to amend the summons in any respect. On the one hand, no express sanction is given to it by any of the

Small Debt Statutes, and at the time when they were enacted, the amendment of judicial pleadings was a step little known. On the other hand, the Legislature and the Supreme Court have since that time markedly recognised the policy of allowing amendments in ordinary litigations; and there is a wanton rigidity in compelling parties and witnesses to disperse and come together on some future day, to the annoyance and loss of them all, because of some error that a few strokes of the pen could, without unfairness, put right. If, therefore, both parties wish any amendment, it is thought that it may be made; and, even where one party objects, that it ought to be made if he is not unduly prejudiced thereby. It will, of course, be for the Court to consider whether the expenses should be modified or refused, or even the amendment allowed only on payment of some specified sum being made on the spot to the other party; and the Court or the Clerk will authenticate the amendment. It will also be in the power of the Court to allow an adjournment to the defender to meet the case made by the alteration of date or other amendment.

§ 41. Where sanctioning the proposed amendment would lead to an alteration of the Books of Court, it is a more serious matter, and one that a Court will be more chary of granting. There would undoubtedly be risk of a good deal of difficulty, and that parties and officers would become negligent, trusting to the indulgence of the Court to rectify such errors as might be made. So far as parties are concerned, the imposition of a material amand might keep that right; but it would be no sufficient restraint on officers. Still the matter is one for the discretion of the Court; and there is, it is thought, no absolute incompetency in making *any* amendment of consent, even though it may require the Books of Court to be altered.

§ 42. ASSIGNATION OF THE DECREE.—It has already been pointed out (§ 21) that a person may assign a claim or account, and that the assignee can sue for it in the Small Debt Court. By section twelve of the Personal Diligence Act (1 & 2 Vict. cap. 114), provision is made for any person who has acquired right to an extract of a decree presenting a minute in terms of the Act and obtaining author-

ity to operate on the decree and diligence. This provision is not made applicable expressly to the Small Debt Act; but having regard to the views expressed by the Court in *Crombie* v. *M'Ewan* (17 Jan. 1861, 23 D. 333; 33 J. 167), in regard to the name of the creditor not being required in the diligence, there seems no sufficient reason why the assignee of a small debt decree should feel himself precluded from taking steps to enforce it.

§ 43. EFFECT OF THE DECREE.—The decree in an ordinary action is for payment, in slump or by instalments, or of absolvitor, or of dismissal of the action. A question of some importance is what effect is to be attached to this decision. Opinions have been expressed that a decree pronounced in a Small Debt Court can never suffice to justify a plea of *res judicata*. The matter will be found fully discussed and the authorities noted in the cases of *Carmichael* v. *Eadie* (29 April 1874, 18 J. of J. 390) and *Cuthill* v. *M'Lachlan* (31 July 1874, Guth. 520); and it probably may now be accepted as certain that a decree absolvitor or condemnator granted by the Sheriff or the Justices in the Small Debt Court will found a valid plea of *res judicata;* while as regards a judgment dismissing the case after hearing parties, it is not easy to see why the pursuer should on the same allegations be allowed to bring up exactly the same case every week. Of course if his ground of action be altered, or if he seek a different remedy, that would be another matter,—see *Taylor* v. *Coulston* (18 Feb. 1840, 2 D. 612; 12 J. 354) and *Flowerdew* v. *Bathie* (4 July 1850, 12 D. 1178; 22 J. 524).

§ 44. DURATION OF THE ACTION.—A small debt action does not fall asleep by the elapse of a year and a day without procedure in it (*Kean* v. *Lindsay*, 30 Sept. 1852, 25 J. 8; 1 Irv. 88); but in the Sheriff Court it is necessary (section XIII.), if a decree has been pronounced, but the decree has not been enforced by poinding or imprisonment within a year from its date, or from the charge thereon, that a new charge be given before the decree is put in force. The three months during which a defender may sist a decree pronounced

in absence against him, run from the date of such new charge (*Lochie* v. *Brown*, 28 April 1863, 35 J. 461; 4 Irv. 363).

§ 45. EVIDENCE.—The evidence does not in general require to be noted, and whatever notes may be taken by the Court for its own satisfaction or otherwise, should not be made part of the process (*Miller* v. *M'Callum*, 14 Nov. 1840, 3 D. 65; 13 J. 24). In cases under the Game Laws Amendment Act of 1877 in the Sheriff Small Debt Court, the Sheriff must, if asked by either party, record the evidence. If the Court has reason to think a witness is perjuring himself, even though specially cautioned to be careful as to the statements he is making, and considers the case so flagrant as perhaps to require ulterior procedure, it is generally best shortly to note the suspected statements and read them over to the witness, and, if he adheres to them, to take his signature to them. But it is not essential to do so; for a prosecution for perjury is competent on the recollection of parties who heard the false statements made. In all cases it will be well to consider whether a reprimand administered at once, or at the close of the case or of the Court, till which period the open detention of the offender is in itself a punishment, will not suffice,—especially if he is a witness and not a party. A threat of prosecution not given effect to is of questionable prudence; and a prosecution, where the case is not pretty clear and the matter somewhat material, is inexpedient.

§ 46. RECONVENTION.—Opinions differ as to whether the equitable remedy of reconvention has place in the Small Debt Court. The facilities provided in the Sheriff Small Debt Court by section XI. for presenting a counter-claim seem, to some extent at least, to remove the need for it. The matter will be found carefully considered in *Gray* v. *Stevens* (4 July 1877, 21 J. of J. 526), where the negative view was sustained in Lanarkshire.

SHERIFF SMALL DEBT ACT.

1 VICTORIA, CAP. 41.

An Act for the more effectual Recovery of Small Debts in the Sheriff Courts, and for regulating the Establishment of Circuit Courts, for the Trial of Small Debt Causes by the Sheriffs, in Scotland.—[12th July 1837.]

WHEREAS an Act was made in the tenth year of the reign of his Majesty King George the Fourth (*a*), intituled, *An Act for the more effectual Recovery of Small Debts, and for diminishing the Expenses of Litigation in Causes of small amount, in the Sheriff Courts in Scotland,* the provisions of which have been found beneficial, but experience has pointed out certain alterations by which its benefits will be extended and rendered more effectual; and it is expedient that such alterations and the former provisions should be consolidated in one Act: Be it therefore enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the said recited Act shall be and the same is hereby repealed from and after the first day of October next, save and except as to such causes as shall have been commenced under the authority of the said recited Act before the said first day of October next, and shall be then depending, all which causes shall be carried to a conclusion according to the rules prescribed by the said Act, notwithstanding

10 G. 4, c. 55.

Repeal of former Act.

Commencement of Act.

this Act; and this Act shall commence and take effect from and after the said first day of October next (*b*).

(*a*) There was an earlier Act still—6 Geo. IV. cap. 24—intituled, "An Act for the more easy Recovery of Small Debts in the Sheriff Courts in Scotland." Its provisions were in the main consolidated with the amending provisions of the Act of 1829: both Acts are now repealed.

(*b*) The whole of the first clause is repealed by the Statute Law Revision Act, No. 1, of 1874.

Scope of Act.

II. And be it enacted, That it shall be lawful for any Sheriff (*a*) in Scotland within his county to hear, try, and determine in a summary way, as more particularly hereinafter mentioned (*b*), all civil causes (*c*) and all prosecutions for statutory penalties (*d*), as well as all maritime civil causes and proceedings (*e*), that may be competently brought before him, wherein the debt, demand, or penalty in question (*f*) shall not exceed the value of (*g*) twelve pounds sterling, exclusive of expenses and fees of extract: Provided always, that the pursuer or prosecutor shall in all cases be held to have passed from and abandoned any remaining portion (*h*) of any debt (*i*), demand, or penalty beyond the sum actually concluded for in any such cause or prosecution.

Part of any debt, &c., not sued for to be held abandoned.

(*a*) This includes any *interim* Sheriff or Steward Depute, appointed *ex nobili officio* by the Court of Session, or by a Principal Secretary of State under 39 & 40 Vict. cap. 70, sec. 51; and any permanent, interim, or honorary Sheriff or Steward Substitute. See section XXXVII.

(*b*) Section XIII., *et passim*.

(*c*) The scope of these words is coextensive with the jurisdiction of the Sheriff in actions with petitory pecuniary conclusions. But it is in his power —and it would be unfair not to exercise that power—to order written pleadings, and so take the case to the ordinary roll, if the defender asks such to be done, and states a defence which obviously justifies his request. It is plain, however, from section IV. that the Legislature intended no restriction to be made as to the *character* of the actions to be brought in the Small Debt Court, provided only that the sum for which the Sheriff was to decern did not exceed the statutory limit,—that the point at issue was one competent to the jurisdiction of a Sheriff,—and that it was one to which the machinery of the Small Debt Act could be applied. Accordingly, where an action has been brought in the Ordinary Court, no matter how great its value be, the parties can, if they think fit, have the case disposed of in terms of the provisions of the Small Debt Act,—see 16 & 17 Vict. cap. 80, sec. 23. The words are so important, that they may be quoted: "It shall be competent in all civil causes above the value of twelve pounds, competent before the Sheriff, for the parties to lodge in process a minute, signed by themselves or their procurators, setting forth their agreement, that the cause should be tried in the summary

way provided in the said first recited Act (the Small Debt Act), and the Sheriff shall thereupon hear, try, and determine such action in such summary way, and in such case the whole powers and provisions of the said first recited Act shall be held applicable to the said action: Provided always, that the parties, or any of them, shall be entitled to appear and plead by a procurator of Court." A Form for the requisite Minute will be found at the end of the Schedules to this Act.

In further support of this view it will be noticed (section IV.) that wherever the sum sued for in any cause in the Ordinary Court is, or before the closing of the record has come to be, not more than £12, the Sheriff can remit the case to his Small Debt Roll. There is no restriction on the character of the case that may be so dealt with,—it is *any* cause; the only restraint is that the consent of the pursuer must be got. The defender can object and appeal to the Sheriff to try and get his view adopted; but he has no veto on the proposed remit. See also A. S. 4 Dec. 1878, sec. 2. And as Lord Neaves said in *Sandys* v. *Lowden*, 26 Nov. 1874, 2 R. (J. C.) 7; 3 Coup. 43, in regard to the Debts Recovery Act,—"seeing that the object of the Act is favourable—viz., to secure despatch in the recovery of debts of small amount—we must construe it literally." The ruling and most instructive decision on this whole subject is the case of *Nixon* v. *Caldwell*, 1 June 1876, 3 R. (J. C.) 31; 3 Coup. 291, in which the concurrent opinions of Lord J. C. Moncreiff, Lord Young, and Lord Craighill, were to the effect that where the cause is a civil cause,—where the debt sued for does not exceed £12,—where the Sheriff has jurisdiction over the parties,—and where the subject of the action is one competent for a Sheriff to deal with, he has jurisdiction to try the cause. "There is nothing," said Lord Moncreiff, "to entitle us to go beyond the pecuniary conclusion in the summons in judging of the abstract competency of the action in the Sheriff Small Debt Court. It is another question whether the Sheriff, in the exercise of his discretion, will entertain the action, or will not rather say to the parties, I must sist this action until you determine this important question on which it turns in a more deliberate manner. But it is a matter for the Sheriff's discretion. If he chooses to entertain it, it cannot be said that the action is incompetent." See also the instructive judgment of Lord Young to the same effect.

It has sometimes been urged that it is incompetent for a Sheriff sitting in the Small Debt Court to entertain a question which implies continuing liability; and in earlier years a stray opinion to that effect has, once or twice, been incidentally expressed by a judge in the hurry of a Small Debt Appeal on Circuit, after possibly a somewhat meagre argument. The statute itself, however, it is thought, conclusively refutes any such view; for section V. expressly recognises the competency of rent being sued for. And as matter of practice, rates and assessments, instalments of loans, subscriptions and aliment, are in daily use to be sued for. All dubiety on the point, however, is now removed by the authoritative judgment in the case of *Nixon* v. *Caldwell*, above referred to. That action was by one poor inspector against another, for relief of advances made to a pauper; and the defence was that the action was incompetent in the Small Debt Court, as the decision required the determination of the question of the pauper's settlement, and involved the future liability for the pauper's aliment. It was observed by Lord J. C. Moncreiff, in the course of his judgment: "The question is, Whether an amount of ali-

ment can be sued for in the Sheriff Small Debt Court. I am of opinion that if it can be sued for at all in an inferior Court it can be sued for in the Sheriff Small Debt Court. . . . But it is said, in the second place, that the decision in this case virtually decides the question of continuing liability, and that, therefore, the summons involves a great deal more than is actually concluded for in it. Now here I would draw attention to the distinction between the words used in the Small Debt Act—'All civil causes . . . wherein the debt, demand . . . in question shall not exceed the value of . . .'—and those used in the Sheriff Courts Act of 1853, limiting the reviewable causes to 'causes not exceeding the value of . . .' Now, in the latter case the value of the cause may be a great deal more than the pecuniary amount actually concluded for, and therefore the amount of the debt or demand in question has not been held conclusive, in such cases, of the competency of review. But in the former case there is nothing to entitle us to go beyond the pecuniary conclusion in the summons in judging of the abstract competency of the action in the Sheriff Small Debt Court. . . . I should be sorry to come to any conclusion that would lead to this result,—that the Small Debt jurisdiction could not be made available in the case of any payments falling due periodically where one of the termly payments has fallen into arrear. Generally speaking, there is no question as to liability raised in such cases, but only as to amount. But even where there is a question of liability raised, it would be a most unfortunate thing if the matter could not be summarily disposed of, leaving the settlement of the ultimate right to be decided, if the parties wish it, in a competent Court." So also Lord Young: "The ground on which the debt is demanded may apply to other demands which are future or contingent, and may be conclusive of them so far as the Sheriff Small Debt Court is concerned, but nevertheless the debt sued for is under £12, and the Sheriff, *prima facie* at least, has jurisdiction. The question is, Whether, when it appears from the nature of the defence that the Sheriff is asked to determine a question which might involve continuing liability, and might go to a certain length to establish it, his jurisdiction ceases. One can conceive many cases in which it would be very proper for the Sheriff to supersede consideration of a Small Debt case, and refuse to apply himself to the consideration of an important question incidentally raised and having a wide application, but necessary to be determined for the decision of the case before him. . . . But all that does not touch the question of jurisdiction, but only the propriety and expediency of its exercise in a particular case before something else is done." Lord Craighill concurred in these opinions.

Having regard, then, to the fact that the Small Debt Act is applicable to "all civil causes . . . that may be competently brought before" a Sheriff, where he is not asked to award more than £12, and to the foregoing instructive and authoritative views enunciated by the High Court of Justiciary after full consideration, it may be regarded as settled that wherever the sum which the Sheriff is asked to award in slump or in instalments originates in a matter competent to his jurisdiction and against a person subject to it, the action can be brought in the Small Debt Court; but that it will be open to the Sheriff, if he think it proper in the circumstances of the *particular* case (but not *class* of cases), either to remit it to his Ordinary roll, or to sist procedure in the cause till some point material to its determination be authoritatively settled in a competent Court. Without attempting to enumerate

exhaustively the various classes of cases that are competent or incompetent in the Small Debt Court, the following may be briefly mentioned, and Forms for most of them will be found in the notes to Schedules A and B.

1. *Accounts.*

All kinds may be sued on.

2. *Accounting.*

Such an action cannot be brought in the ordinary form of a count reckoning and payment with alternative conclusions, but only by the pursuer claiming a sum and setting forth the details which he recognises as justifying the demand for payment of the sum claimed by him.

3. *Affiliation.*

Where the child has died before the action is raised, the case is generally brought for the sum due, if it does not exceed £12, in the Small Debt Court; but it will be open to the Sheriff, if the defender or his procurator is averse to its being tried without a record of the evidence or the possibility of appeal, to entertain any application for the case being remitted to the Ordinary roll. But I have never known of such an application being made. The case, however, will, like any other case (*e.g.*, some slanders), which raises a question unsuited for public investigation, probably be deferred till the end of the roll, or taken at a special diet. Where the child has died since the date of raising the action in the Ordinary Court, it is the almost invariable practice, so far as my experience goes, for the parties to ask the case to be remitted to the Small Debt roll. There thus seems no incompetency, where both parties wish it, in a case of affiliation being tried in the Small Debt Court even where the child is alive. But this, it is obvious, will rarely occur; and generally only where the child is alleged to have been born prematurely and the defender admits intercourse but doubts his paternity and wishes a judicial opinion on the matter. The decisions which are sometimes founded on as settling that a case of this kind cannot be tried in the Small Debt Court apply only to the Justice of Peace Court; and the difference between the jurisdiction of Justices of the Peace in their Small Debt Court and the Sheriff in his has already (§ 13) been pointed out. See also *Jerry* v. *High* in the Sheriff Court of Lanarkshire, 26 April 1877, Guth. 417; 21 J. of J. 356.

4. *Aliment.*

There is perhaps no class of cases in which the cheapness and despatch of the Small Debt Court are of greater use. To resort to the Ordinary Court in order to have it decided whether a son shall pay 1s. a-week, which he offers, or 2s. a-week, which is asked, would seem oppressive; and this is by far the most common type of an alimentary case. And as the various sons may be in different counties, the reasons for resorting to the Small Debt Courts seem the stronger. As regards the case of a wife's suing for aliment from a husband by whom she has been deserted, seeing that the utmost the Sheriff Courts can do is to give it for a few months (*Smith* v. *Smith*, 11 June 1874, 1 R. 1010; 11 S. L. R. 581; *M'Donald* v. *M'Donald*, 25 May 1875, 2 R. 705; 12 S. L. R. 471; and *Niven* v. *Niven*, 21 Feb. 1877, Guth. 30), and cannot interfere at all if a question of status is involved (see Status, *infra*), it is eminently expedient that if the case is suited for the Small Debt Court it should be brought there. About 250 alimentary claims are disposed of in the Glasgow Sheriff Small Debt Court every year. See further

Nixon v. *Caldwell*, and *Jerry* v. *High*, *ut supra*. It has already been pointed out in the first two paragraphs of this note that the mere fact of the basis of the demand being of greater value than £12, or involving a question of future liability, is no bar to the case being brought in the Small Debt Court. Section XVIII. of the Act, and section 9 of 38 & 39 Vict. cap. 90, expressly contemplate the case of the sum decerned for being payable by instalments; and if the sum be (say) £2, payable at the rate of 2s. a-week for twenty weeks, this prevents any further claim being made for the period comprised within these weeks, and so gives effect to the provision at the end of section II. Aliment, too, it is to be remembered, is payable in advance; and cannot be awarded for a bygone period unless to pay debt. If therefore the functions of the Small Debt Court could not go further than to decern for a sum of aliment that ought already to have been paid, as in *Aberdeen* v. *Walker*, 6 May 1870, 7 S. L. R. 476, the result would be anything but salutary. And it is not to be forgotten that it is always in the power of the Sheriff to remit the case to the Ordinary roll if such a course seems expedient. Where the party is suing *in forma pauperis* it is desirable the poor's agent should attend, and the fees of Court will not be payable unless decerned for and recovered.

5. *Assessments*, &c.

See *M'Lachlan* v. *Tennant*, 4 May 1871, 43 J. 390; 2 Coup. 45. Also under the Salmon Fisheries Preservation Act to any amount, see section XXII.

6. *Constitution.*

This may either be to constitute liability by the debtor for the first time, or where he has already been found liable to a party who is now dead, and whom the pursuer represents. In either case, expenses will be given only in the event of opposition being made to the decree; and in the latter case the first decree will be given up to the Clerk of Court.

7. *Damages.*

On any ground competent in the Sheriff Court damages may be sought to the amount of £12, and under the Game Laws Amendment Act of 1877 to the amount of £50. Damages or compensation for loss or injury done by mobs is expressly sanctioned by section XXII. of this Act.

8. *Declarator.*

Only under the Employers and Workmen Act, 1875.

9. *Delivery.*

This is one of the most common forms of action in the Small Debt Court. For furthcomings the form is provided by section IX. and Schedule D; and for multiplepoindings by section X. and Schedule E. As to remits from Ordinary Court, see section IV. note (*a*). In other cases the pursuer sues for what he considers the value of the article wrongly withheld from him; and the Sheriff, if it be proved or admitted that the pursuer is entitled to the article, continues the case for a few days in order that he may get it. If it be then still withheld, he decerns for its value as damages.

It is common to intimate verbally what the amount of the expenses is to be, and that if the article is given up and these be paid, neither party need appear. Accordingly, when the case is called at the adjourned diet and neither party appears, the case is dismissed. It would seem oppressive to say that, where a pursuer is content to have the value of an article belonging

to him which the defender wrongfully withholds, he must resort to the Ordinary Court and sue there for delivery or damages; while if the defender wrongfully retains the article there is no impropriety in making him pay for it. Accordingly, in *Maclean & Hope* v. *Thomas*, 17 Dec. 1869, 42 J. 159; 7 S. L. R. 145, it was held that where some guano had gone amissing in a party's possession he was competently sued for its price as if under a contract of sale. And it is to be noticed that such redress was there given under the Debts Recovery Act,—a statute whose scope is much narrower than that of the Small Debt Act.

10. *Employers and Workmen Act.*

Under this Act the Sheriff can pronounce a great diversity of orders—*e.g.*, for money to be paid, caution to be found, a contract to be rescinded, service to be returned to, imprisonment, &c. But in the case of workmen the sum to be awarded must not exceed £10, and in the case of apprentices the premium must not exceed £25.

11. *Expenses.*

Where diligence has been used to put in force a decree pronounced in any Court, the expenses of that diligence (which cannot be recovered under that decree) may be obtained in the Small Debt Court to the statutory amount. But expenses already decerned for, or able to have been decerned for, cannot be again awarded,—*Miller* v. *M'Callum*, 14 Nov. 1840, 3 D. 65; 13 J. 25.

12. *Furthcoming.*

Provided for by section IX.

13. *Inlying Expenses.*

See Affiliation.

14. *Instalments.*

Of loans, rents, subscriptions, taxes, &c. See paragraph two, p. 23.

15. *Multiplepoinding.*

Provided for by section X.

16. *Pauper.*

Advances made for a pauper,—*Nixon* v. *Caldwell*, *ut supra*, p. 23.

17. *Penalty.*

See as to these note (*d*) *infra*, and section XII., note (*g*).

18. *Property.*

Questions involving the right to the property of moveables incessantly occur, and pretty often questions of heritable right come up incidentally. But the Small Debt Court is unsuitable for the adjudications of questions of property which are truly of a declaratory character; though occasionally parties who desire a judicial opinion of their rights in a small property manage to obtain it by suing for their proportion of the nominal value of the subject, or bringing an action for some trifling amount of damages to it, much in the same way that in English Courts a right of property is tried under an action for trespass.

19. *Reduction.*

Reduction is only competent in the Sheriff Court *ope exceptionis*. A *résumé* of the law applicable to the subject will be found stated in my Handbook of Sheriff Court Styles, *voce* Reduction, p. 210, note (*o*). It will be noticed that the form of reduction given in bankruptcy by 20 & 21 Vict. cap. 19, sec. 9, is conferred only on the Sheriff Ordinary Court. The form of reduction under the Employers and Workmen Act, 1875, is, however,

expressly made competent in the Small Debt Court. And in *Wilson* v. *Glasgow Tramway Company*, 22 June 1878, 5 R. 981; 15 S. L. R. 656, it was held by Lord J. C. Moncreiff and Lord Gifford that the power of reduction conferred on the Sheriff by the 11th section of the Sheriff Courts Act of 1877 applies to the Small Debt as well as to the Ordinary Court. And Lord Gifford expressed the opinion that even apart from that enactment a Sheriff, sitting in the Small Debt Court, can get behind a formal deed, where the justice of the case requires it, without the necessity of an action of reduction being first brought in the Court of Session. The form of the action is to make the claim just as if the receipt, discharge, or other disputed document had not been granted.

20. *Remit.*

A case may be remitted from the Ordinary roll under the fourth section of this Act or the twenty-third section of the Sheriff Courts Act of 1853.

21. *Removing.*

Under 1 & 2 Vict. cap. 119, sec. 11, where a house or other heritable subject is let for less than a year at a rent not exceeding £30, a Summary Removing can be brought, which is to be heard and determined like a Small Debt cause. The necessary Forms will be found at the end of the Schedules to this Act.

22. *Rent.*

23. *Sequestration.*

For past due rents under section V.; in security under 16 & 17 Vict. cap. 80, sec. 28; and to attach the goods of a deceased or absent tenant, see section V., note (*f*), 7, and Schedule B.

24. *Status.*

Where the contention of parties raises a question of status, "for instance, were it answered to a summons against a man for necessary furnishings made to his wife, that the woman in question was not his wife, I can conceive that the Sheriff, if he believed the defence to be seriously stated and insisted upon, might very properly sist procedure until the question was determined in an appropriate action."—Per Lord Young in *Nixon* v. *Caldwell*, 1 June 1876, 3 R. (J. C.) 33; 3 Coup. 291. But where such a question arises not incidentally, but is the point to determine which the action is brought, the action is incompetent except in the Court of Session, and must be dismissed. Accordingly, in *Strang* v. *Strang*, 21 Feb. 1882, 4 Coup. 563; 19 S. L. R. 724, Lords Young and Adam held in a case of this kind that the "contention involves a question of status—of a wife's right to live separate from her husband—and that it was clearly and absolutely incompetent to dispose of it in the Sheriff Court, particularly in the Small Debt Court." In this case the holders of a sum of £10, which had been arrested in their hands by a married woman, raised a multiplepoinding to ascertain whether they were to pay this sum to the arrester or to her husband to whom it would have been otherwise payable. She had been living apart from her husband for about twenty years. In such circumstances it is obvious that there being no emergency such as would justify the intervention of the Sheriff Court, the Small Debt Court could not entertain any application for aliment.

25. *Taxes.*

See *M'Lachlan* v. *Tennant*, 4 May 1871, 43 J. 390; 2 Coup. 45.

(*d*) These are now in use to be recovered under the Summary Jurisdiction Acts, wherever the penalties are to be recovered "summarily." See sections

2 and 3 of the Summary Procedure Act, 1864, as to penalty. Section 27 provides that nothing in the Act shall "affect any right to sue by way of action in the Court of Session or Sheriff Court in Scotland for the recovery of any penalty or forfeiture, save and except as to the right of suing for such penalty or forfeiture in the Sheriff Small Debt Court, in the form provided in the fourth recited Act" (the Small Debt Act). And the preambles of the statute and of the Act of 1881 expressly refer to the fact that by the Small Debt Act "provision was made for the recovery of statutory penalties by way of action in the Sheriff Court in certain cases." Looking to these facts, and to the terms of section 3 of the Summary Jurisdiction Act of 1881, it would appear that the Legislature intended that statutory penalties, if they are to be recovered summarily, should be recovered under the Summary Jurisdiction Acts. See Moncreiff on Criminal Review, p. 108, to this effect; and *Hutchison's Trs.* v. *Glasg. City and Dist. Ry.*, 20 March 1884. In 26 J. of J. 158, a contrary opinion is stated, by the late Sheriff Barclay it is understood; and having regard to the penalties recoverable against witnesses under the twelfth section of this Act, and the twenty-fourth section of the Sheriff Courts Act of 1838, the matter is perhaps not always free from difficulty.

(*e*) This clause was not contained in either of the previous Acts, and may be referred to as showing the desire of the Legislature to make the Act as extensively and widely useful as possible.

(*f*) The words "in question" are used in this Act instead of "concluded for," as in the previous Acts. It is obvious from section one that this change in the phraseology was not made with the view of limiting the scope of the Act; and it is not likely the Legislature thought any man with a right to a debt, demand, or penalty of £8, 6s. 8d. would deliberately sue for less, and abandon the remainder, which he did not actually conclude for. Under section IX. the sum for recovery of which the furthcoming is used may be of any amount; but the measure of the arrestee's liability is £12. Under section V. express provision is made for suing for rent; but if tenancy be denied, it is plain that the amount which, strictly speaking, is "in question" is the total of the whole rents. Long usage had adopted the rule which received authoritative sanction in the important case of *Nixon* v. *Caldwell*, 1 June 1876, 3 R (J.C.) 31, 3 Coup. 291, in which the lucid exposition of the matter by Lord J. C. Moncreiff may be specially consulted. It cannot, therefore, be too clearly kept in view that the pecuniary test of the competency of an action in the Small Debt Court is not "the value of the subject in dispute," as in the Sheriff Courts Act of 1877 (40 & 41 Vict. cap. 50, sec. 8); nor the value of the "cause," as provided in the Sheriff Courts Act of 1853 (16 & 17 Vict. cap. 80, secs. 22, 23, and 24), in regard to the matter of appeal; but, like the case of appeal for jury trial of a pecuniary claim (A.S., 11 July 1828, sec. 5), it is whether the amount which can be decerned for does not exceed £12. Accordingly, in *Dalglish & Kerr* v. *Anderson*, 22 Feb. 1883, 20 S. L. R. 412, it was observed by Lord Craighill that, where a pursuer sued for payment of an account consisting of several items, and restricted the total amount to £12, "if £12 remained due after sums not established had been disallowed, the Sheriff was not only entitled but bound to decern for the £12 to which the claim had been restricted." This instructive expression of opinion furnishes, it is thought, the proper pecuniary test of the competency of a Small Debt cause. Several positions may be figured :—

1. A pursuer may have a claim which he assesses at £100, but if from doubts of his ability to prove it, or from a desire to have it speedily disposed of at small cost, or from distrust of the defender's ability to pay it, or from any other cause, he prefers to restrict the amount to £12, he is entitled to bring his action in the Small Debt Court. In other words, the Sheriff can entertain a claim of any value in the Small Debt Court, but he cannot decern for more than £12. The affirming of the pursuer's claim may imply liability by the defender to pay rent, or taxes, or aliment, or any termly payment for any number of years; but if the Sheriff is not called upon to decern for more than £12, there is no pecuniary incompetency in the action being brought in the Small Debt Court. If the defender is dissatisfied he may ask the case to be sent to the Ordinary roll, or he has always the remedy of obtaining at once, or ultimately, the opinion of the highest Courts by an action of declarator in the Sheriff Court, if the value of the subject in dispute does not exceed the sum of £1000, or in the Court of Session if it does. See *Nixon* v. *Caldwell*, 1 June 1876, 3 R. (J. C.) 31; 3 Coup. 291.

2. The pursuer may sue for £100, give credit to the defender for a counter-claim of £80, and sue for the balance restricted to £12. If the defender values his claim at a larger amount and objects to having his hand forced, and intimates his preference not to have his claim so disposed of, he is entitled, it is thought, to have it removed from consideration, and to have action for it reserved. But if he acquiesces in the amount, or is content to have it determined, the Sheriff will proceed to ascertain the full value of the two sides of the account and decern for the difference to an amount not exceeding £12. See *Robertson* v. *M'Kendrick*, 14 Dec. 1870, 9 M. 283; 43 J. 133.

3. If the pursuer sues for £100, restricted to £12, and the defender puts in a counter-claim whose amount is shown to be £12, the judgment will not be absolvitor, but for the excess of the actual value of the pursuer's claim over this sum to an amount not exceeding £12; for he restricts, not the value of his claim, but the sum for which decree may be given, to £12. This is well illustrated in the case of an account of (say) two items each of the amount of £12; the pursuer does not abandon any one of the items, or half of each, but leaves it to the Court to ascertain if there are £12 to which he is entitled. Hence the defender's claim is to be subtracted from the pursuer's claim, so far as each is sustained; and decree will pass, to the extent of £12, for the gross excess due to the pursuer.

4. It is obvious that if the real value of the pursuer's claim exceeds £12 he should give credit, however small, for any claim the defender has threatened him with. If he omits to take this course, and sues for £100 restricted to £12, the defender may refrain from stating a counter-claim, and subsequently bring a substantive action for his claim, and thus obtain a decree for as large a sum as the pursuer holds his decree for.

(*g*) Extended from £8, 6s. 8d. by 16 & 17 Vict. cap. 80, sec. 26, which provides that "the said first recited Act shall be read and construed as if the words 'twelve pounds' were substituted for the words 'eight pounds six shillings and eightpence,' wherever these latter words occur in the said first recited Act." In the case of actions for the recovery of damages under the Game Laws Amendment Act of 1877, the claim may amount to £50; and for payment of assessments under the Salmon Fisheries Act of 1828 to any value. In disputes dealt with under the Employers and Workmen Act of 1875 the

amount claimed, or decerned for, or for which security is to be found, must not in the Small Debt Court exceed £10. In Summary Removings the rent must not exceed £30.

(*h*) *I.e.*, any portion which is due at the date when the summons was issued and could be validly sued for with the other portion,—except in the case of a furthcoming (section IX.) Accordingly, it is competent to sue or sequestrate for £12 of past due rent, and also to sequestrate for £12 of rent to become due. The latter sum cannot be decerned to be paid then, and may never require to be.

(*i*) *Ejusdem generis* and arising out of the same transaction. A party is not *bound* to sue for rent and for the price of butter in the same summons; but he *may* do so if he chooses, and the defender can have no interest to object. See the effect of this clause examined in the Sheriff Ordinary Court of Lanarkshire in *Usher & Co.* v. *Rutherfurd*, 17 Nov. 1858, 1 Scot. Law Journ. 18, and *Wise* v. *Shaw*, 20 March 1863, 2 Scot. Law Mag. 61. And in *Fraser* v. *Ferguson*, 21 April 1870, 42 J. 396, 1 Coup. 432, it was held by Lord Neaves that a pursuer who had raised an action for £10, 10s. 5½d. for wages, loans, and price of goods, was not thereby precluded from suing for £10, 6s. 6d. as the balance of a bill, and from also bringing a third action for £12 as the value of a mare detained by the defender, or alternatively for £9, 10s. as cash advanced by the pursuer for the price of it. See also note (*h*) *supra*.

Form of proceedings.

III. And be it enacted, That all such causes and prosecutions which the pursuers or prosecutors thereof shall choose to have heard and determined according to the summary mode hereby provided shall proceed, except as herein-after provided (*a*), upon summons or complaint, agreeably to the form in Schedule (A.) annexed to this Act, and containing warrant to arrest upon the depending action (*b*), stating shortly the origin of debt or ground of action (*c*), and concluding against the defender; which summons or complaint, being signed by the Sheriff Clerk (*d*), shall be a sufficient warrant and authority to any Sheriff's officer (*e*) for summoning the defender to appear and answer at the time and place mentioned in such summons and complaint, not being sooner than upon the sixth day after such citation, and the same, or the copy thereof, served on the defender, shall also be a sufficient warrant for summoning such witnesses and havers as either party shall require (*f*); and a copy of the said summons or complaint, with the citation annexed (*g*), and also a copy of the account (*h*), if any (*i*), shall be served at the same time by the Sheriff's officer on the defender personally or at his dwelling-place, or in case of a company, at their ordinary place of business (*j*); and the officer

Summons to state ground of action.

Copy of account to be served with summons.

summoning parties, witnesses, or havers, shall in all cases under this Act return an execution of citation (*k*), signed by him, or shall appear and give evidence on oath of such citation having been duly made; and all such citations given by an officer alone without witnesses (*l*), and executions thereof subscribed by such officer, shall be good and effectual to all intents and purposes.

(*a*) Sections V. IX. and X.

(*b*) Unless the demand is for wages,—8 & 9 Vict. cap. 39.

(*c*) *E.g.*, sale, loan, rent, damages, &c. The ground of debt may be set forth either in the summons itself; or on the back of it,—*Henderson* v. *Wilson*, 18 Jan. 1834, 12 S. 313; 9 F. C. 184; or more conveniently, on a separate paper annexed to the summons and referred to in it,—*Aitken* v. *Learmonth*, 27 April 1855, 2 Irv. 156; and *Granger* v. *Mackenzie*, 28 Sept. 1866, 5 Irv. 324. While it is well that the origin of debt or ground of action should be clearly and fully stated, the statute is not to be too strictly construed, and if the details supplied are sufficient to let the defender know what the case is he must be prepared to meet, the summons should not be thrown out. See *Birrell & M'Caig* v. *Buchanan*, 4 May 1871, 43 J. 388, 2 Coup. 43. There is the more justice in so holding when it is remembered that though the defender may be imperfectly informed of the case against him, the pursuer has not necessarily any information at all of the defence that is to be made in answer. But the details must be such as to allow the case to be adjudicated on. Hence if the action be on an account, it ought not to start with "To balance from last account," for some of these items may be open to dispute. But the objection on this score does not arise if the defender admits the balance to be correct, or if the case is able to be disposed of. Hence where in an action, under the Debts Recovery Act, the only statement of the ground of action under various dates was "To Goods," an objection to the want of details was repelled, apparently in respect of invoices having been sent,—*Cox Brothers*, v. *Jackson*, 16 June 1877, 4 R. 898. Sale is implied to be the ground of debt where the claim is for the price of specified goods.

Where the debt is constituted by pass-book, it is sufficient to say so, giving the date of the last article supplied. But if it appear there was no pass-book, there will then be no origin of debt or ground of action set forth and no account before the Court, and the action may have to be dismissed. If part of the goods was supplied per pass-book, and part per account, this will be stated and a copy of the account be furnished with the summons. Action for the part in the account cannot be reserved, if payment be due: in terms of section II. it will be held to be abandoned if the case goes on and it is not sued for. If the action be per pass-book, it will, as a rule, not be proper to go further back in regard to disputed items than the last payment made to account on returning or exhibiting the pass-book. The balance at that date must in general be looked on as an agreed on or adjusted debt, and even items in it struck at by the Tippling Acts ought not, it is thought, to be gone back upon. As regards the Tippling Acts, it must be kept in view that, like money paid *ob turpem causam*, what has been done cannot be undone: the consumer who has paid cannot get back his

money; and if a party is sued for an account and admits the amount but pleads the Tippling Acts, any indefinite payments which he has made to account can be placed against the items struck at by the Tippling Acts,—*Murphy* v. *Reid*, 18 May 1839, 1 D. 788; 11 J. 464.

The pursuer must take care to deduce his title to sue, if he be an assignee or the like; but if the account be stamped with a penny stamp and indorsed "Pay the above account to," &c., this will suffice,—*Ritchie* v. *M'Lachlan*, 27 May 1870, 8 M. 815; 42 J. 477. See also *Kay* v. *Begg & Balfour*, 26 Jan. 1837, 15 S. 422; 9 J. 230. In terms of Schedule A, the date of the last item got must be given where possible, because prescription runs from it and not from the date of the last payment to account. Hence, therefore, the date of the account is the date of the last article supplied. But in fairness the dates of all the items may well be given, for the defender is otherwise placed at a disadvantage; and if one item be three years earlier than the next one, the triennial prescription will apply to it and all preceding items if of an ordinary account. It is important also that the dates of the payments to account be given and the sums so paid; for frequently the questions at issue are the amounts paid, and if receipts were not regularly given, there are in that event no *termini habiles* before the Court for deciding the points. But if the defender does not impugn the amount with which he is credited there is no necessary objection to their amount being stated in slump.

(*d*) Unless he is a party, other than a nominal raiser, to the action,—*Smith* v. *Manson*, 8 Feb. 1871, 9 M. 492; 43 J. 261. Any alterations on the summons will require also to be authenticated by the Sheriff Clerk on giving it out, so as to show that they were made before service. In *M'Lean* v. *Douglas*, 28 Jan. 1834, 12 S. 348; 6 J. 211, the letters "ean" of the defender's name were written on an erasure, but a suspension brought of the decree five years afterwards was refused. There, however, the suspender did not deny that he was the proper man, and that he owed the money, and that the action had been served on him personally.

(*e*) Or enrolled law-agent,—45 & 46 Vict. cap. 77, sec. 3. As to the requisites and form of citation, see note (*j*) *infra*, and Schedule A, Nos. 2 and 3, and notes thereto.

(*f*) In terms of the conclusions of the summons,—see Schedule A, No. 1.

(*g*) For a Form, see Schedule A, No. 2.

(*h*) If the copy of the account is not served, there is no valid service,—*Brown* v. *Richmond*, 16 Feb. 1833, 11 S. 407; 5 J. 249; and the law used to be that the service was inept, even though a copy of the account had been served, if the citation and the execution did not say so,—*Wallace* v. *Hume*, 3 July 1835, 13 S. 1034; 7 J. 467; and *M'Laren* v. *Finlay*, 12 Dec. 1835, 14 S. 143; 11 F. C. 120. In the two former cases the Court were not unanimous; in the last they were, but it was not averred in it that, as matter of fact, the account had been served. These decisions, however, it will be noticed were pronounced under the forms of the prior Acts, which required the citation and execution to specify the words "and a copy of the account." These words are omitted in the forms provided by the Legislature for the present Act, and it is understood the omission was made to get rid of the above decisions. Hence, though a copy of the account must be served, it is not now essential, though it certainly is convenient, that the officer should say so in his citation and execution. Any such objection however, may, it would

seem, be waived,—*Rennie* v. *N. B. Ry. Co.*, 20 April 1874, 1 R. (J. C.) 22; 2 Coup. 541.

(*i*) The ground of debt may be written on the summons, or on the back of it, or on a separate paper annexed to it and referred to in it,—see note (*c*) *supra*. If the claim be per pass-book, and the pass-book be stated in the summons to be in the defender's possession, it is not necessary to serve a copy of it: indeed the pursuer may have none to serve.

(*j*) The service may also be by an enrolled law-agent, and by registered letter. The letter is to contain a copy of the summons and account with the citation thereon, specifying the date of posting, and is to be sent "to the known residence or place of business" of the party, "or to his last known address, if it continues to be his legal domicile or proper place of citation." For further details, and for the requisite form, see the statute, 45 & 46 Vict. cap. 77, *infra*, and Schedule A, No. 2, and notes thereto. Such posting, it is provided, "shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation." If "for any reason" delivery of the letter is not made, the letter is immediately to be returned through the Post Office to the Clerk of Court with the reason for the failure to deliver marked thereon, and the Clerk is to intimate this to the party seeking to effect the service. The provisions of the statute are very crude; but as the order for service is not made by the Sheriff, it would appear that the party (unless he can satisfy the Court that the letter has been tendered at the proper address of the party and refused, in which case the tender is to be equal to a good citation), is to treat the warrant as unexhausted, and cite his opponent in common form in terms of the Small Debt Act. It will be convenient that he should get the Sheriff or Sheriff Clerk to fix the Court at which the case is to be heard. Though this form of service is declared to be only optional, practically parties are compelled to adopt it by the provision that no higher fees are to be allowed than those provided for it, unless the Sheriff "shall be of opinion that it was not expedient in the interests of justice that such service should be made in such manner."

By the Citation Amendment Act of 1871,—34 & 35 Vict. cap. 42,—service by affixing the summons or other writ to the gate or door, or by leaving it with an inmate where the defender has removed, is abolished, except where the officer is satisfied that the defender "is refusing access or concealing himself to avoid citation or service, or has within a period of forty days removed from the house or premises occupied by him, his place of dwelling for the time not being known," in which case the officer may affix the writ to the gate or door, or leave it with an inmate, and "send to the address which after diligent inquiry he may deem most likely to find the defender, or to his last known address, a registered letter by post containing a copy" of the writ; "and the posting of such intimation shall constitute a legal and valid citation or service." The execution must in such a case bear that the officer "endeavoured to effect service at the defender's last known dwelling-place and the circumstances that prevented it, and shall be accompanied by the Post Office receipt for the registration." Under the provisions of the Act in question relative to citation, "defender" includes "the person or persons named in and called upon to answer any summons, complaint, decree,

and warrant *or other order or writ* or proceedings in the Small Debt Courts;" and would therefore include the pursuer where the defender is serving a sist of a decree obtained against him in absence. If the service is not executed personally, this must appear in the officer's execution, which will set forth that the summons was left with the defender's wife, or servant, or a member of his family, as he could not be found. In *A.* v. *B.*, 28 Jan. 1834, 12 S. 347, a service of a summons in the hands of a woman within the defender's dwelling-house was sustained; but though this may not be incompetent, it is not expedient, and it would be insufficient in the case of a diligence.

(*k*) For the Form see Schedule A, No. 3, and notes.

(*l*) "In all cases before the Small Debt Courts and proceedings therein, it shall not, except in cases of poinding, sequestrating, or charging, be necessary for any officer to be accompanied by any witness or concurrent,"—34 & 35 Vict. cap. 42, sec. 4.

Remit from Ordinary to Small Debt Court.

IV. And be it enacted, That in any cause before the Sheriff's Ordinary Court, in which the debt, demand (*a*), or penalty in question shall not exceed the value of twelve pounds sterling (*b*), or shall have exceeded the value of twelve pounds sterling, but from interim decree or otherwise (*c*) the value shall, previous to the closing of the record (*d*), be reduced so as not to exceed twelve pounds sterling, exclusive of expenses and fees of extract, it shall be competent to the Sheriff, if he shall think proper, and with the consent of the pursuer, to remit such cause to such of his Small Debt Court rolls (*e*) as may be proper, either of his own motion or upon the motion of any party in the cause: Provided that if the pursuer shall not consent, the provisions of this Act (*f*) as to the fees or expenses to be allowed in causes below the value of twelve pounds brought not according to the summary form herein provided, shall be applied to such causes subsequent to the proposition for remit, if the Sheriff shall think proper so to modify the expenses (*g*): Provided also, that when a case has been remitted by the Sheriff-Substitute from the Ordinary Court to the Small Debt Court, an appeal shall be competent to the Sheriff against such remit, but no reclaiming petition shall be allowed against such remit.

Pursuer to consent.

Appeal against remit.

(*a*) The demand may be for delivery of a specified article and failing delivery for payment of £12. If the case be remitted to the Small Debt roll and the pursuer be held entitled to delivery, without any written order to that effect being pronounced, the case can be continued for a few days for such delivery to be made; and, in default of its being made, decree for the value can then be given. See section II., note (*c*), 9.

(*b*) As to the construction to be put on this, see section II., note (*f*), and, as to the extension of value, section II., note (*g*).

(*c*) *E.g.*, payment to account, death of the child in an action of affiliation, or the like.

(*d*) Thus if the value of the cause be above £12, the action can at any stage be remitted to the Small Debt roll, of consent of *both* parties, under 16 & 17 Vict. cap. 80, sec. 23; while if the principal sum in question either was originally, or before the closing of the record has come to be, not greater than £12, then with consent of the pursuer alone the case can be remitted from the ordinary Court to be tried summarily under the provisions of the Small Debt Act. In this way no provision is made for the case of an action coming to be of a value not exceeding £12 *after* the closing of the record. But having regard to the obvious expediency of such a course, and to the observations of Lord Deas in *Philip* v. *Forfar Building Investment Co.'s Trs.*, 16 Sept. 1868, 41 J. 1; 1 Coup. 87, it is common to remit such a case for summary trial.

(*e*) Ordinary or Circuit.

(*f*) Section XXXVI. See also A. S. 4 Dec. 1878, sec. 2, which appoints the same rule to be applied even though no proposition has been made for a remit of the cause.

(*g*) "Where a cause is remitted to the Small Debt Court roll under section 4 of the Small Debt Act, there shall be allowed in respect of the trial of the cause, to cover every trouble, a fee of £1,"—A. S. 4 Dec. 1878, Part IV. Where the remit is under § 23 of the Sheriff Courts Act of 1853, Part III. provides that the "charges for taking instructions, attendances, and precognitions" shall be the same as in ordinary cases, and for the hearing and debate where the amount concluded for does not exceed £25 shall be £1, and in other cases from £1, 10s. to £3. But this fee is only to be charged once. The expenses may always be modified.

Sequestration for rents.

V. And be it enacted, That it shall be competent for the Sheriff in the Small Debt Courts, established or to be established under this Act, to hear, try, and determine, in the summary form hereby provided, applications by landlords (*a*) or others having right (*b*) to the rents and hypothec for sequestration and sale of a tenant's effects for recovery of rent (*c*), provided the rent or balance of rent claimed (*d*) shall not exceed (*e*) twelve pounds sterling; and the summons and warrant of sequestration and procedure shall be agreeable to the forms directed in the Schedule (B.) annexed to this Act (*f*); and the officer, when he executes the warrant, shall get the effects appraised by two persons (*g*), who may also be witnesses to the sequestration; and an inventory or list of the effects, with the appraisement (*h*), shall be given to or left for the tenant, who shall be cited in manner and to the effect aforesaid; and an execution of the citation and sequestration, with the appraisement of the

Summons.

Appraisement

and execution to be

effects, shall be returned to the clerk within three days (*i*); and on hearing the application in manner provided by this Act relative to other causes, the Sheriff shall dispose of the cause as shall be just, and may either recall the sequestration in whole or in part (*j*), or pronounce decree for the rent found due, and grant warrant for the sale of the sequestrated effects on the premises, or at such other place and on such notice as he shall by general or special regulation direct, and failing such directions the sale shall be carried into effect in the manner herein-after directed (*k*) for the sale of poinded and sequestrated effects; and if after sequestration the tenant shall pay the rent claimed, with the expenses (*l*), to the pursuers, or consign the rent, with two pounds sterling to cover expenses, in the hands of the Clerk of Court, the sequestration shall *ipso facto* be recalled, in case of payment, on the clerk writing and signing on the back of the summons or warrant the words "payment made," which, on evidence (*m*) being produced to him of payment of the rents claimed, with expenses, he is hereby required to do, and in case of consignation, after the clerk shall in like manner have written and signed the words "consignation made," on the same being intimated (*n*) by an officer of Court to the sequestrating creditor.

lodged in three days.

Sale.

Recall of sequestration.

(*a*) By section XXXVII. "landlord" is defined as including "any person having a right to exact rent, whether as owner, liferenter, heritable creditor in possession, principal tenant, or otherwise."

(*b*) *E.g.*, a landlord's assignee.

(*c*) By 16 & 17 Vict. cap. 80, sec. 28, the provisions of this clause are extended to "all sequestrations applied for *currente termino* or in security." It is therefore competent to apply simultaneously for sequestration for rent past due and to become due. As the applications cannot be practically combined in the Small Debt Court, separate summonses will be needed, and there seems no incompetency in each being for £12,—see section II., note (*h*). A Form for a sequestration in security will be found in note (*a*) to Schedule B.

(*d*) It is quite competent to sue for a month's rent where a house is said to be let at £144 per annum for a term of years, if the rent be payable monthly. But it must be remembered that in terms of the provisions of section II., if at the date when the summons is issued, more than £12 are due, the pursuer will lose the balance. It may be that the defender will deny having entered into the lease; but the nature of his defence cannot render the action incompetent. It cannot be too clearly kept in view that the only test of the competency of an action in the Small Debt Court for payment of money, which it is within the jurisdiction of a Sheriff to award, is the amount to be

decerned for,—see section II., notes (*c*) and (*f*). Hence an action may be brought in the Small Debt Court, which if brought in the Ordinary Court could be appealed to the Court of Session. See this very clearly explained by Lord J. C. Moncreiff in *Nixon* v. *Caldwell*, 1 June 1876, 3 R. (J. C.) 31; 2 Coup. 291. See also *Philip* v. *Forfar Building Investment Co.'s Trs.*, 16 Sept. 1868, 41 J. 1, and 1 Coup. 87.

(*e*) Extended from £8, 6s. 8d. by 16 & 17 Vict. cap. 80, sec. 26,—see section II., note (*g*). There may be simultaneously a sequestration in security for £12, and a sequestration for past due rent of £12, as the two kinds of sequestration cannot be combined in one Small Debt Summons, and only one is due. See section II., note (*h*).

(*f*) Sequestration is a very potent and costly remedy, and is occasionally liable to misuse,—either to oppress a tenant or unduly to protect his effects against the diligence of his ordinary creditors. Some important points as to the use and effect of sequestration may with advantage be kept in view.

1. Sequestration can only be used for rent of heritable subjects,—see *Catterns* v. *Tennent*, 12 May 1835, 1 Sh. and M'L. 694; and *Clark* v. *Stewart*, 14 Dec. 1872, 10 S. L. R. 152. Hence where the tenant is owing taxes, or water-rate, or payment for the use of a cart, or of a horse, or of steam-power, &c., no matter though the stipulated payment be called rent, sequestration cannot be used for it, if the amount is separate from the amount of the house or shop rent; but if the amount stipulated for is a slump sum, so that the proportions effeiring to the former subjects and to the house or shop do not appear, then sequestration for the *cumulo* amount is competent.

2. Sequestration must not be used for a period outwith the tenancy,—*Tennent's Trs.* v. *Maxwell*, 2 March 1880, 17 S. L. R. 463. In that case the tenant's effects were sequestrated for twelve months' rent, though there was only eleven months' occupancy; and, while decree was given for the rent, the sequestration was recalled as being radically bad. So also if premises become uninhabitable and the tenant leaves, if the landlord sequestrate his effects for the rent of the period when occupation was impracticable, the sequestration will be recalled as inept and an action of damages may follow.

3. Sequestration is competent during the current term and for three months afterwards. Thus where a house is let by the month, there are four months during which sequestration can be used; while if it be let by the year, no matter whether the rent is payable quarterly, monthly, or daily, the landlord's remedy is available during fifteen months.

4. But the effects sequestrated must have been in the premises during the period for the rent of which the diligence is used. Thus if a house be let by the month and sequestration be used for the December rent, it is incompetent to sequestrate effects for that rent which have been removed from the premises before December or brought in after it,—see *Thomson* v. *Barclay*, 27 Feb. 1883, 10 R. 694; 20 S. L. R. 440. By the Removal Terms Act of 1881, the terms of Whitsunday and Martinmas, for the purposes of entry or removal in any building in any burgh whether let verbally or in writing after 22d August 1881, are (in the absence of express stipulation to the contrary) defined to be noon on 28th May and 28th November, or the following day, if the 28th be a Sunday. But for the purposes of payment of rent, Whitsunday and Martinmas remain 15th May and 11th November.

5. The effects must be open to sequestration. Wearing apparel and docu-

ments of debt are not,—Bell's Pr., § 1276. It is doubtful whether lent articles are,—*Adam* v. *Sutherland*, 3 Nov. 1863, 2 M. 6; 36 J. 7. Hired furniture is—Bell, *ut supra;* but the invariability of this anachronous rule is now more or less questioned,—*Adam*, *ut supra; Nelmes* v. *Ewing*, 23 Nov. 1883, 11 R. 193; 21 S. L. R. 134. And in Perthshire and Lanarkshire single articles on hire have been held not subject to the landlord's hypothec,—see *Milne* v. *The Singer Sewing Machine Co.*, 29 July 1881, 25 J. of J. 499; *Docherty* v. *Do.*, 26 May 1882, 26 J. of J. 445; and *Stevenson* v. *Donaldson*, 8 Jan. 1884, 28 J. of J. 277, and authorities quoted in these cases. So also a lodger's clothes and tools are not open to sequestration; and it is doubtful if even his other goods are in all cases. And as regards all subjects let for agricultural or pastoral purposes, of an extent greater than two acres, the landlord's hypothec has been abolished,—43 Vict. cap. 12, sec. 1.

6. Sequestration can be used only for a fixed rent. Hence where a person occupies subjects which have not been let to him, though he will be liable in payment of such sum as is proper in name of rent (*Glen* v. *Roy*, 28 Nov. 1882, 10 R. 239; 20 S. L. R. 165), there will be no room for sequestration.

7. There must be a sufficient basis for the sequestration—namely, either that the tenant is owing rent, or that his creditors are doing diligence, or that he is removing his effects, or some such material justification for the landlord taking steps for his own protection. Where a tenant has died, there is frequently much need for the use of sequestration; but some difficulty is often found in using it, and resort to the Ordinary Court might be unduly costly. To meet such a case two summonses will be found in note (*a*) to Schedule B, the one where the party called is an intromitter or a representative in some form of the deceased tenant, and the other where he is merely the accidental custodier of his effects.

8. The defence may consist either of a challenge of the sequestration, or of a counter-claim of any nature. See as to this section XI., note (*b*). If the counter-claim be sustained the sequestration will be to that extent recalled; but if the sequestration be used for rent that is not due, or for more rent than is due, it is thought, as pointed out in the second paragraph of this note, that no warrant of sale can be granted.

9. The sequestration must be registered,—30 & 31 Vict. cap. 42, secs. 2 and 7.

(*g*) Any persons of competent knowledge, though under twenty-one and though not appraisers by occupation, *may* suffice: but the greater their efficiency the better. They must be put on oath,—see section XX., note (*b*).

(*h*) The articles must be appraised articulately, and not in slump, and the sequestration must not be excessive,—*Robertson* v. *Galbraith*, 16 July 1857, 19 D. 1016; 29 J. 481; *M'Kinnon* v. *Hamilton*, 21 June 1866, 4 M. 852, 38 J. 445; and *Le Conte* v. *Douglas*, 1 Dec. 1880, 8 R. 175, 18 S. L. R. 163.

(*i*) Much difference of opinion prevails as to whether the failure of the officer to return the execution duly is fatal to the proceedings. It is plain the Clerk cannot receive it after the three days; but it is thought that if the Court be satisfied the failure occurred through circumstances for which it would be unjust to hold the officer responsible, the execution may be received, provided the defender is not prejudiced thereby. Stringency, however, in the enforcement of the requirements of the Act is very desirable. See section XX., note (*j*), and section XXXIV.

(*j*) See note (*f*), *supra*, branches 2 and 8.

(*k*) Section XX.

(*l*) Where a sequestration is used in security, and eventually the rent is timeously paid, some Sheriffs make it a hard and fast rule either to give the pursuer no expenses, or to find him liable in them to the defender. If the rent had not been timeously paid, the pursuer would of course have got his expenses. A good deal is obviously to be said in favour of this convenient rule. And it is also a well-settled principle that the pursuer of an ordinary debt must bear the cost of diligence used in security of his debt,—*Symington* v. *Symington*, 11 June 1874, 1 R. 1006; 11 S. L. R. 579. But on the other hand such diligence can scarcely be looked on as a compulsitor to payment of the sum claimed; while sequestration unquestionably often is, and probably in many cases in the Small Debt Court where it is used, the rent would not otherwise have been obtained. Now the hard and fast rule above mentioned in reality concedes that the test of the matter is whether the landlord's action was justifiable, though the only view taken by it is backwards. But it seems not unfair to consider what the state of circumstances was when the sequestration was used; and if it appear that its use was occasioned by the fault of the tenant—*e.g.*, in removing his effects—it seems not unreasonable to hold it as a safe rule to determine each case on its own merits.

(*m*) A valid receipt will, in general, be the proper evidence; but there may be equipollents. If the Clerk feels in doubt, considering the perhaps unduly limited protection he has if anything goes wrong,—*Watt* v. *Ligertwood*, 21 April 1874, 1 R. (H.L.) 21,—it is not unreasonable that he should take the advice of the Sheriff if he thinks it prudent to do so. See *Jaffray* v. *Carswell*, 7 July 1835, 13 S. 1048; 7 J. 491.

(*n*) Such intimation will be needed only in the case of consignation, and not if the pursuer has been paid. For a Form of intimation, see Supplementary Forms appended to the Schedules.

Arrestments

VI. And be it enacted, That the pursuer of any civil cause, including maritime civil causes and proceedings, may use arrestment on the dependence of the action of any money (*a*), goods, or effects, to an amount or extent not exceeding the value of twelve (*b*) pounds sterling, owing or belonging to such defender, in the hands of any third party (*c*), either within the county in which such warrant shall have been issued or in any other county or counties: Provided always, that before using such warrant in any other county

may be indorsed.

it shall be presented to and indorsed by the Sheriff Clerk (*d*) of such other county, who is hereby required to make such indorsement (*e*) on payment of the fee herein-after mentioned (*f*): Provided also, that any (*g*) arrestment laid on under

They lapse in three months.

the authority of this Act shall, on the expiry of three months from the date thereof, cease and determine, without the necessity of a decree or warrant of loosing the same,

unless such arrestment shall be renewed by a special warrant or order, duly intimated to the arrestee, in which case it shall subsist and be in force for the like time and under the like conditions as under the original warrant, or unless an action of furthcoming or multiplepoinding, in manner herein-after provided (*h*), shall have been raised before the expiry of the said period of three months, in which case the arrestment shall subsist and be in force until the termination of such action of furthcoming or multiplepoinding (*i*).

(*a*) Wages cannot be arrested on the dependence,—8 & 9 Vict. cap. 39.

(*b*) Extended from £8, 6s. 8d,—see section II., note (*g*). The arrestment should attach a sum sufficient to cover all that falls to be paid. See section IX., note (*c*).

(*c*) Care must be taken that the arrestment specifies the character in which the arrestee owes the money. He may owe it as an individual, or as a trustee, or in various other characters. The arrestment must therefore first describe the arrestee so as to identify him, and then qualify this by specifying the character in which he owes the money. Hence an arrestment in the hands of Robert Wilson, writer, Glasgow, will attach only the funds owed by him as an individual to the common debtor. If he owes them as, say, an executor, the arrestment should be used in the hands of Robert Wilson, writer, Glasgow, executor nominate of, &c. Neither will an arrestment in the hands of A. B. attach a debt which is due not by A. B. but by A. B. & Co., of which he is a partner. The vital importance of the point is that if the arrestment be inept there can be no decree of furthcoming subsequently obtained. See *Graham* v. *Macfarlane*, 11 March 1869, 7 M. 640, 41 J. 332; and *Hay* v. *Dufourcet & Co.*, 19 June 1880, 7 R. 972; 17 S. L. R. 669.

(*d*) If there are more Sheriff Courts than one in the county, though the Sheriff Clerk or any of his Deputes can competently make the indorsement, the proper person to apply to will be the Depute Sheriff Clerk of the district in which the arrestee resides, especially as the Register of Indorsations is kept there.

(*e*) "Indorsed in terms of the statute," A. B., Sheriff Clerk of, &c.

(*f*) One shilling, section XXXII.

(*g*) By 1 & 2 Vict. cap. 114, sec. 22, it is enacted that "all" arrestments shall in future prescribe in three years instead of five; but if the provisions of the present Act restrict the life of an arrestment in execution as well as on the dependence to three months, the terms of the later Act will not prolong its existence to three years. There has been no decision of the Supreme Court given on this point; but it is generally held in the Sheriff Courts that, whatever may have been the intention of the Legislature, the effect of the phraseology of the section is to make the provision of three months' duration apply not only to arrestments on the dependence but also to arrestments on the decree. The provisions of the last clause of the fifth section of the Debts Recovery Act—30 & 31 Vict. cap. 96—apparently countenance this view.

(*h*) Sections IX. and X. The furthcoming or multiplepoinding must be raised in the Small Debt Court. If the fund be so large that the multiple-

poinding is raised in the Ordinary Court, the arresting creditor, to preserve his preference, should bring his furthcoming in the Small Debt Court and get it remitted to the Ordinary Court and conjoined with the multiplepoinding.

(*i*) The action creating the litigiosity must have been raised within the three months: but whilst it survives the subject will continue litigious. Hence if a furthcoming be brought within 85 days after the arrestment and continue pending for 30 days, and a multiplepoinding be brought 95 days after the arrestment, a decree pronounced under it within the 115 days will carry the arrested sum or subject to the party preferred to it by the decree.

Wages, how far arrestable.

VII. And be it enacted and declared, That wages of labourers and manufacturers shall, so far as necessary for their subsistence, be deemed alimentary, and, in like manner as servants' fees, and other alimentary funds, not liable to arrestment (*a*).

(*a*) By 8 & 9 Vict. cap. 39, all "wages" are exempted from arrestment on the dependence of an action raised under the Small Debt Act. And by 33 & 34 Vict. cap. 63, "the wages of all labourers, farm-servants, manufacturers, artificers, and workpeople" are exempted from arrestment for debts contracted after 9th August 1870, unless (1) in so far as they exceed 20s. per week, or unless (2) the arrestment is used "in virtue of decrees for alimentary allowances or payments, or for rates and taxes imposed by law," and sets forth "the nature of the debt for which it has been used." In the former of these two cases—viz., where it is the excess over 20s. per week that is arrested, it is enacted (section 2) that "the expense or cost of any such arrestment shall not be chargeable against the debtor unless in virtue of such arrestment the arresting creditor shall recover a sum larger than the amount of such expense or cost." Even, therefore, if where several arrestments are used a considerable sum is recovered, each arrestment must be separately considered, and the incidence of its cost determined by the amount of its own success.

Loosing of arrestments.

VIII. And be it enacted, That when any arrestment shall have been used on the dependence of any action, it shall be competent to the defender to have such arrestment loosed, on lodging with the Sheriff Clerk of the county (*a*) in which such arrestment shall have been used a bond or enactment of caution, by one or more good and sufficient cautioners to the satisfaction of such Sheriff Clerk (*b*), agreeably to the form in Schedule (C.) annexed to this Act, or on consigning in the hands of such Sheriff Clerk the amount of the debt or demand, with five shillings for expenses in cases of actions for sums below five pounds (*c*), and ten shillings in cases of higher amount, or on producing to such Sheriff Clerk (*d*) evidence of the defender having obtained decree of absolvitor

in the action, or of his having paid the sums decerned for (*e*), or of his having consigned in the hands of the Clerk of the Court in which the action depended the sums decerned for or the amount of the debt or demand, and expenses as aforesaid, when no decree has yet been pronounced; and a certificate in the form in the said schedule (*f*) given by the Sheriff Clerk of the county in which such arrestment shall have been used of a bond or enactment of caution to the extent of the debt or demand and expenses having been lodged with him, or of consignation, as above provided, having been made in his hands, shall operate as a warrant for loosing any arrestment used either in that or in any other county (*g*) on the dependence of the same action, without any other caution being found or any other consignation being made by the defender (*h*). Certificate of loosing.

(*a*) Or one of his Deputes; but the proper person will be the Depute Sheriff Clerk of the district of the county where the arrestment was used, if there are more Courts than one in the county.

(*b*) The Sheriff Clerk, if in doubt, is entitled to require that the proposed cautioner shall be certified by a Justice of the Peace as of sufficient means before agreeing to accept him.

(*c*) The criterion is the amount for which decree is asked. So where a pursuer claims £12, but concedes in his summons that there is a counter-account for £8 due by him, the amount of the debt will fall to be viewed as under £5.

(*d*) As an Edinburgh creditor may take out a summons against a Glasgow debtor and arrest on the dependence in the hands of a Stirling arrestee, the Sheriff Clerk of Stirling will have no cognisance of the fate of the case in Glasgow, unless certiorated in manner provided.

(*e*) The natural evidence will be an extract decree absolvitor, or a receipt for the payment. See section V., note (*m*).

(*f*) Schedule C.

(*g*) An arrestment on the dependence is an arrestment in security, and the pursuer may use several either because their value may be doubtful or to make up the amount of his debt. If therefore he gets caution for, or consignation of, the sums which he claims or has got decree for, he has got all he wants by his precautionary step; and accordingly it is provided that thereon the one caution or consignation is to loose all arrestments used on the dependence.

(*h*) There are thus six ways in which a defender may get arrestments *on the dependence* loosed. If the case has not yet been disposed of—(1) by finding sufficient caution for the sums sued for and expenses with the Sheriff Clerk of the county in which the arrestment has been used; or (2) by consignation of these sums with such Sheriff Clerk; or (3) by such consignation with the Clerk of the Court where the case is depending. If the case has been disposed of—

(4) by obtaining decree of absolvitor; or (5) by payment of the sums decerned for; or (6) by consignation thereof with the Clerk of the Court where the case depended. It will thus be noticed that caution is competent only for the full amount sued for and expenses, and with the Sheriff Clerk of the county in which the arrestment was used. Consignation of such sum may be made only before decree (for the expenses decerned for might exceed five or ten shillings), and with either the Clerk of the Court where the case is depending or of the county in which the arrestment is used; but consignation of the sums decerned for can be made only with the Clerk of the Court in which the case depended.

Furthcomings.

IX. And be it enacted, That any person entitled to pursue an action of furthcoming where the sum or demand sought to be recovered under the furthcoming shall not exceed the value of twelve (*a*) pounds sterling, exclusive of expenses and fees of extract, who shall choose (*b*) to have the same heard and determined according to the summary mode provided by this Act, shall proceed by summons or complaint agreeably to the form in Schedule (D.) annexed to this Act, concluding for payment of the sum for which arrestment has been used (*c*), or for delivery of the goods and effects arrested (*d*), which summons or complaint, being signed by the Sheriff Clerk of the county in which the arrestee resides (*e*), shall be a sufficient warrant and authority to any Sheriff's officer (*f*) for summoning the arrestee and the common debtor to appear and answer at a Sheriff Court of the county in which the arrestee resides, the same not being sooner than the sixth day after the date of citation (*g*), and also for summoning witnesses and havers for all parties (*h*); and in the event of the common debtor not residing and not being found within the county in which such action of furthcoming shall be brought, he may be cited by any Sheriff's officer in any other county on the said warrant, the same being first presented to and indorsed by the Sheriff Clerk of such other county (*i*), who is hereby required to indorse the same on payment of the fee hereinafter mentioned (*j*), to appear at a Sheriff Court in the county in which the arrestee resides, the same not being sooner in such case than on the twelfth day after the date of citation: Provided always, that the arrestee and the common debtor shall be cited to appear on the same court day, and that a copy of the said summons or complaint, with

Procedure.

Citation.

Indorsation.

the citation annexed thereto, shall be duly served by the officer, all in the same manner as hereinbefore provided in other causes and prosecutions under authority of this Act (*k*), but always allowing to a party (*l*) cited to appear in the Sheriff Court of a different county from that in which the citation shall be given double the time required by this Act to be allowed to a party cited to appear in the Sheriff Court of the county within which the citation shall be given: Provided also, that the pursuer of such action of furthcoming shall not by such action be held to have restricted the amount of the debt due by the common debtor (*m*).

Debt not restricted by furthcoming.

(*a*) Extended from £8, 6s. 8d., see section II., note (*g*).

(*b*) If the sum arrested, or the debt for which it is used, does not exceed £12, the furthcoming will require to be brought in the Small Debt Court, or else the penalties as to expenses imposed by section IV. may be incurred. But if the debt and arrestment both exceed £12, the creditor can choose whether he will sue in the Ordinary or the Debts Recovery Court, or for £12 of the debt in the Small Debt Court.

(*c*) In an action in the Supreme Court or in the Sheriff Ordinary Court the sums made furthcoming (if possible) are the debt, its interest, the expense of constituting the debt, and of the arrestment used; but the expenses of the furthcoming can be recovered only from the common debtor,—see *Mackay's Practice*, ii. 554, and cases quoted. But it may be doubted whether the Legislature did not intend in the Small Debt Court that a different rule should be followed. It is obvious that if expenses be given against the common debtor there will be an arrestment used for these and a furthcoming will follow, and so on *ad infinitum*; for the chances of payment by a Small Debt debtor otherwise are small. Now on turning to the decree in Schedule D, it will be observed that it is expressly provided in the case of arrested goods that the warrant of sale is to be granted for as much as will satisfy the sum for which arrestment was used and the "*expenses of process and the expense of sale.*" If therefore the expenses of the furthcoming are to be paid out of the sale of the arrested goods, it is difficult to see why they should not be paid out of the amount of the arrested funds. And it will be noticed that the alternative form of the decree is for "sums."

(*d*) With a view to their sale. See section XX., note (*k*).

(*e*) If the arrestment is used on the dependence, the summons is taken out in the county where the common debtor resides; but under section VI. the pursuer gets it indorsed, for the purpose of arresting, by the Sheriff Clerk of the county in which the arrestee resides. Similarly arrestment in execution is obtained by indorsation of the decree. The furthcoming is then brought in the county in which the arrestee resides.

(*f*) See section XXXIV.; or to any enrolled law-agent,—45 & 46 Vict. cap. 77, sec. 3.

(*g*) Care must be taken to have the arrestee and the common debtor cited for the same Court.

(*h*) Witnesses and havers can lawfully be cited at any time before the

diet; but unless they are cited forty-eight hours at least before the diet, they do not incur the penalty provided by section XII. They ought, however, to be cited at the same time as the parties, if possible.

(*i*) The indorsement is—"Indorsed by me in terms of the statute," A. B., Sheriff Clerk of, &c.

(*j*) One shilling,—section XXXII.

(*k*) Section III.

(*l*) Not to a witness or haver.

(*m*) The only bearing in the case of a furthcoming of the restriction imposed by section II. is as regards the arrestee. He cannot be made to pay more than £12 of the arrested funds if the action be brought in the Small Debt Court; so that if he is sure the case is to be brought there he may pay away the excess of the arrested funds over £12.

Multiple-poindings

X. And be it enacted, That where any person shall hold a fund or subject which shall not exceed (*a*) the value of twelve (*b*) pounds, which shall be claimed by more than one party, under arrestments or otherwise (*c*), it shall be competent (*d*) to raise a summons of multiplepoinding in the Small Debt Court, established or to be established under this Act, to the jurisdiction of which the holder of the fund or subject shall be amenable, which summons and procedure thereon shall be agreeable to the form in Schedule (E.) annexed to this Act, and the claimants and common debtors, and also the holder of the fund or subject, if the process be raised in his name by any other party interested, shall be cited in manner directed to be followed in actions of furthcoming raised under this Act (*e*), and it shall be competent to the Sheriff, when he shall see cause, to order such further intimation or publication of the multiplepoinding as he may think proper, by advertisement in any newspaper or otherwise; but no judgment preferring any party to the fund or subject *in medio* shall be pronounced at the first calling of the cause (*f*), or until due intimation has been given, such as may appear satisfactory to the Sheriff, in order that all parties may have an opportunity of lodging their claims on the fund or subject *in medio*, and such claims shall be prepared agreeably to the form in Schedule (E.); and the Sheriff shall hear, try, and determine the cause as nearly as may be in the summary form provided by this Act (*g*).

to be raised where the holder of the fund resides.

Procedure.

Claims.

(*a*) He cannot restrict the sum to £12.

(*b*) Extended from £8, 6s. 8d.,—see section II., note (*g*).

(*c*) In this way there need not be double distress in the way of arrestments,

as required by *Mitchell* v. *Strachan*, 18 Nov. 1869, 8 M. 154; 42 J. 67. It will be sufficient if there are two or more *bonâ fide* claims made.

(*d*) Competent either to the holder or to any other party interested.

(*e*) See the preceding section—that is, if the claimants and common debtors all reside in the same county as the holder of the fund the induciæ will be five days at least; if they do not all reside in the same county the summons will call on eleven days' induciæ, and the warrant of citation will require to be indorsed.

(*f*) The first step will be to ascertain if there are any objections to the competency of the action; then, if there are any objections to the amount of the fund *in medio*, and, if necessary for the determination of this point, advertisement or intimation may have to be ordered, or proof to be led. On the amount of the fund being settled claims will be ordered to be lodged within a specified number of days, generally six, so as to bring on the case at the Court of the succeeding week.

(*g*) Section XIII., *et passim*.

Counter-claims.

XI. And be it enacted, That where any (*a*) defender intends to plead any (*b*) counter account or claim against the debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer (*c*) on the pursuer (*d*), in the form set forth in Schedule (A.) hereunto annexed, or to the like effect, at least one free day (*e*) before the day of appearance, otherwise the same shall not be heard or allowed to be pleaded, except with the pursuer's consent (*f*), but action shall be reserved for the same.

(*a*) There may be as many counter accounts or claims as there are defenders. A counter account or claim may be made up of various unconnected accounts or claims, or any combination of them.

(*b*) As regards counter-claims some observations may be made on points presented by them; and as regards their effect, see p. 30.

1. *Their Nature and Value.*

Under the Debts Recovery Act,—30 & 31 Vict. cap. 96, sec. 5,—the counter-claim, in order to be entertained, must be of the nature and value of the debts specified in section two of that Act; and when it is not, the Sheriff is authorised, if he thinks fit, to remit the action to his ordinary roll. But under the Small Debt Act no such restriction is imposed. The counter account or claim may therefore be of any pecuniary nature or value. Thus in answer to a claim for rent a defender may competently plead an account for groceries or a claim for breach of promise of marriage. If the pursuer's claim fails, action will be reserved for the counter-claim; while if the claims of both parties are sustained, the one will be set in *pro tanto* extinction of the other, and decree given to the pursuer for the balance, if in his favour, or action reserved for the balance, if in the defender's favour.

2. *When necessary.*

It is sometimes difficult to decide whether the defence stated can be enter-

tained without a counter-claim being brought. The matter cannot be settled by the rules of pleading applicable to the Ordinary Court, for any counter-claim whatever is competent; and the two points to be kept in view are that the pursuer is not to be taken by surprise, and that the defence, if repelled now, is not to be able to be raised substantively hereafter. In general, where the defence is a challenge of the details of the pursuer's claim, it can competently be stated verbally without service of any counter account or claim; but where it amounts to a set-off, it cannot. The pursuer is bound to come into Court prepared to establish every item of his claim or account; and therefore, where the defence is a challenge of it in whole or in part, he is not taken unawares. Accordingly, where in answer to a claim for rent, the defender pleads that he did not receive possession of all the subjects, the defence requires no written counter-claim. But if the defender also asks damages for the loss he has thereby sustained, such a plea must have a counter-claim as its basis, for the pursuer could not know either that compensation was to be claimed, or of what it was to be alleged to consist. So also it is not competent in answer to an action for rent to entertain a claim against the landlord for allowing the subjects to get dilapidated, if occupancy has continued: the tenant must either serve a counter-claim or bring a counter-action. But if he pleads that he was unable to occupy through the subjects becoming uninhabitable, and did not occupy, then as this practically amounts to a withholding of the subjects let, no counter-claim is needed. It must be assumed that the landlord comes into Court prepared to show, if necessary, that he gave all the subjects and all habitable. In the *Scot. N. E. Ry. Co.* v. *Napier*, 10 March 1859, 21 D. 700; 31 J. 350, it was observed that a claim for loss by misconduct could be pleaded *ope exceptionis* in answer to a claim for wages. But as there the pleading gave notice of the defence, this rule would not apply to the Small Debt Court; and the only view that could be received is that laid down by Lord Deas in *Rush* v. *Cowie*, 28 Sept. 1866, 5 Irv. 320, and 5 Scot. Law Mag. 131, to the effect that such a defence requires a counter-claim.

But in deciding whether a counter-claim is necessary in order to entertain the defence pleaded, it is also important to consider whether it is safe to entertain the defence without some written record of it. An unscrupulous, ignorant, or obstinate defender, if wrongly allowed, without serving a counter-claim, to plead a defence which should be based on one, might, if unsuccessful, afterwards raise an action embodying his plea in a substantive form. Now as that action would come before a different Court, the pursuer would have no protection against having to fight the matter a second time, if on the first occasion a defence, which manifestly should not have been entertained, was entertained but repelled. If the defender's plea was competent without a written counter-claim, then the Court before whom action was subsequently brought on it would hold such action barred by the plea of competent and omitted in the first action; while if the unsuccessful counter-claim was produced, the action would be barred by the plea of *res judicata*.

3. *Form of Counter-claim.*

A Form will be found suggested after the Schedules. But no special style is necessary, nor even a heading: a simple business account with the citation on it would suffice; but if framed according to the Form suggested it will be more convenient.

(c) The service may now be made by registered letter and by an enrolled law-agent under the Citation Amendment Act,—45 & 46 Vict. cap. 77. For an example, see note (a) to Schedule A, No. 4. The citation must shortly explain the claim.

(d) If the action is at the instance of a foreign principal and a local mandatary, the counter account or claim must, of course, be against the principal, but it will be served on the mandatary.

(e) *I. e.*, if the defender is summoned to appear on a Thursday, the counter account or claim must be served not later than the Tuesday preceding. If Monday be the diet of appearance, the counter account or claim must be served not later than Friday; if Tuesday, not later than Saturday. Sometimes when a case has been continued, or reheard under a sist, a defender serves a counter account or claim; but this is not what the statute authorises. The service must be before the first diet in the cause; and, except with the pursuer's consent, such a counter account or claim cannot be entertained.

(f) Parties and agents frequently arrange to bring up a counter account or claim which never has been served at all. This is competent enough. But where a pursuer has no agent and is willing to consent to a counter account or claim being entertained, it will generally be proper for the Court, if it sees that, for the reasons stated under note (b), such a step may be perilous for the pursuer to take, to warn him of the risk he may run.

Citation of witnesses.

XII. And be it enacted, That every officer to whom any warrant as aforesaid (a) for citing witnesses and havers shall be intrusted shall cite such witnesses or havers as any party shall require; and all such warrants shall have the same force and effect in any other county as in the county where they are originally issued, the same being first presented to and indorsed (b) by the Sheriff Clerk of such other county, who is hereby required to indorse the same on payment of the fee herein-after mentioned (c); and if any witness or haver, duly cited (d) on a citation of at least forty-eight hours (e), shall fail to appear, he shall forfeit and pay a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained (f); and every such penalty shall be paid to the party citing the witness or haver, and shall be recovered in the same manner as other penalties under this Act (g), without prejudice always to letters of second diligence for compelling witnesses and havers to attend, as at present competent; and it shall be competent to the Sheriff of any county where a witness or haver resides (h) who has failed to comply with the citations originally issued to grant letters of second diligence for compelling the attendance of such witnesses or havers, and

Penalty for non-appearance.

it shall be no objection to any witness that such witness has appeared without citation or without having been regularly cited.

(*a*) Section III.

(*b*) The words of indorsement are, "Indorsed by me in terms of the statute," A.B., Sheriff Clerk of, &c.

(*c*) One shilling,—section XXXII.

(*d*) The witness may either be cited in common form, or by registered letter under 45 & 46 Vict. cap. 77,—see section III., note (*j*).

(*e*) It is not incompetent to cite a witness at any moment before the case is heard, but there is no pecuniary compulsitor on his attendance unless he is cited "at least forty-eight hours" before the diet. This provision is commonly but most improperly read as meaning that the witnesses are to be cited only forty-eight hours before the diet. But the words of the statute are "*at least* forty-eight hours," and the citation ought to be given as soon as possible. It is not fair or reasonable to expect a man with important business engagements to sacrifice them, at whatever cost or inconvenience it may cause him, simply because a litigant is too slovenly or inconsiderate to give him six days' notice; and the Court will be slow to impose a penalty or grant letters of second diligence in such a case. Under the J.P. Small Debt Act the witness must get five days' notice. For further information and suggestions on this point see § 37 of my Handbook of Styles.

(*f*) It is in the public interest that a witness should obey the citation given to him; though, having regard to the frivolous slander and other such cases too often brought in the Small Debt Court, this principle is frequently somewhat strained. What is to be reasonable excuse must be left to the good sense of the Court to determine in each individual case, having regard to its whole circumstances.

(*g*) As this is really damages there seems no sufficient reason, spite of section II., note (*d*), why this so-called penalty should not be recovered under the Small Debt Act.

(*h*) *I.e.*, if a person is cited by an indorsed citation to give evidence or produce books and documents at the Court of another county, the letters of second diligence will have to be obtained from the Sheriff of the county in which such witness or haver resides, and not from the Sheriff before whom he was cited to attend.

Hearing and judgment.

XIII. And be it enacted, That when the parties shall appear (*a*) the Sheriff shall hear (*b*) them *viva voce*, and examine witnesses or havers upon oath, and may also examine the parties, and may put them or any of them upon oath, in case of oath in supplement being required or of a reference being made (*c*), and if he should see cause

Remits.

may remit to persons of skill to report (*d*), or to any person (*e*) competent to take and report in writing the evidence

Commissions.

of witnesses or havers who may be unable to attend (*f*)

upon special cause shown, and such cause shall in all cases be entered in the Book of Causes kept by the Sheriff Clerk, due notice of the examination being given to both parties, and thereupon the Sheriff may pronounce judgment; and the decree stating the amount of the expenses (if any) found due to any party (which may include personal (*g*) charges, if the Sheriff think fit), and containing warrant for arrestment (*h*), and for poinding and imprisonment when competent (*i*), shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in Schedule (A.) annexed to this Act, or to the like effect; which decree (*j*) and warrant, being signed by the Clerk, shall be a sufficient authority for instant arrestment, and also for poinding and sale (*k*) and imprisonment, where competent, after the elapse of ten (*l*) free (*m*) days from the date of the decree, if the party against whom it shall have been given was personally present (*n*) when it was pronounced, but if he was not so present poinding and sale and imprisonment shall only proceed after a charge of ten (*o*) free (*p*) days, by serving a copy of the complaint and decree (*q*) on the party personally or at his dwelling-place; and if any decree shall not be enforced by poinding or imprisonment within a year from the date thereof, or from a charge for payment given thereon, such decree shall not be enforced without a new charge duly given as aforesaid (*r*).

Expenses of cause.

Enforcement of decree.

New charge after a year.

(*a*) Or at any adjourned diet. If neither party appears, owing probably to the case having been settled, the action will be dismissed.

(*b*) If on perusal of the claim it appear relevant and competent, the Sheriff will ask the defender what his defence is, or what he has to say in answer to the claim; but if the claim is not clear, it may be desirable first to ask the pursuer what it is exactly that he wishes. If the defender admits the claim and has nothing further to say, or only wants time to pay, decree will follow for payment in slump or by instalments. Occasionally on being asked what his defence is, he replies that the debt is prescribed, meaning that it is over three years old. But this is not an answer to the claim; the triennial prescription does not cut down a debt: it only imposes a restriction on the mode of proving it. It is still necessary to ask if the debt is due, and then, but not till then, to tell the pursuer he can only prove the debt by the defender's writ or oath. If the claim is under the Game Laws Amendment Act, 40 & 41 Vict. cap. 28, the evidence must be noted, if this be asked by either party.

(*c*) The oath on reference may be required where either the pursuer elects to leave the matter to the defender's oath; or where the defender elects to

leave it to the pursuer's oath; or where the case is of such a character that it can only be competently proved by writ or oath, and writing is awanting; or where the debt is prescribed and proof by writ is not tendered. The reference to oath is made verbally, and by the party or his representative. If the party who is to take the oath is not present, he can be sent for, or the oath taken at an adjourned diet; and unless the Sheriff direct that he is to be in attendance the party referring the matter must cite him to attend.

There are two important points to be kept in view. Firstly, where the debt is prescribed, the pursuer must prove by the defender's writ or oath *both* the constitution and the subsistence of the debt—*i.e.*, that the debt was incurred and that it has not been paid. But when the debt is not prescribed, then a party may refer any part of the proof, or any item of the action to his opponent's oath, and prove the rest in ordinary form. Secondly, there is a difference between a debt being *constituted* in writing and *proved* by writing. Thus a debt which is of more than three years' standing may be proved, however constituted, by any writing under the defender's hand which recognises the debt as incurred and unpaid. But where a claim requires to be constituted in writing—*e.g.*, a mercantile guarantee (19 & 20 Vict. cap. 60, sec. 6)—no proof by writ or oath of the defender that he gave a *verbal* guarantee will be of the slightest use. But of course proof of any kind may be adduced to show that there was a written guarantee.

(*d*) This is a very useful provision; and it is very undesirable that several tradesmen should be brought on each side to speak as to a matter of fact which an experienced and neutral tradesman can satisfy himself in regard to and report to the Court upon. Even questions of overcharge of details and of disconformity to order can with almost invariable advantage be remitted to a person of skill. In most cases all indeed that the parties want is to have some one selected, and perhaps to settle the data he is to go upon. In all cases the remittee can in his report to the Court leave undecided any special point which he thinks will be best settled by it with the information supplied by him.

(*e*) There is, in general, an obvious conveniency in appointing the Clerk of Court where the distance is not great.

(*f*) From age or illness. If the witness or haver is not resident in Scotland, a commission to a consul or vice-consul, or town-clerk, or other competent person, is the only course. In most cases if the witness or haver resides in a distant county in Scotland, it will be proper to grant a commission to take his evidence and not compel him to be brought to Court, unless from the nature of his expected evidence it is plainly desirable the witness should be seen by the Court. If for example an Aberdonian had come to live in Glasgow, and his grocer had to sue him there for goods supplied, it would not be reasonable to require that the witnesses should be brought to Glasgow; and objection is seldom offered except by a debtor who hopes to deter his creditor from pursuing for his debt by causing him as much cost and inconvenience as possible.

(*g*) In the case supposed in note (*f*) of the creditor having to follow his debtor from the place where the debt was incurred to the place where the debtor lives, it will in general be proper to give personal charges, unless the debt is old and the change of residence recent.

(*h*) As to the arrestment of wages in execution, see VII., note (*a*).

(*i*) By 5 & 6 Will. IV. cap. 70, imprisonment for ordinary civil debts under £8, 6s. 8d., exclusive of interest and expenses, was abolished. From this provision were excluded obligations *ad facta præstanda*, taxes or penalties due to the revenue, fines or forfeitures imposed or to be imposed by law, poor-rates or local taxation, and sums decerned for aliment. By 43 & 44 Vict. cap. 34, imprisonment for any civil debt other than taxes, fines, or penalties due to the Crown, rates, assessments, and sums decerned for aliment was abolished. The duration and frequency of such imprisonment as is still competent is fixed by 45 & 46 Vict. cap. 42.

(*j*) See section XIX., note (*a*).

(*k*) The provisions of 44 & 45 Vict. cap. 24, sec. 5, as to the execution in England of a warrant of poinding and sale granted in Scotland, do not seem applicable to a warrant granted under the Small Debt Act.

(*l*) Formerly six.

(*m*) *I.e.*, if the decree is pronounced on the 1st, execution may proceed on the 12th.

(*n*) Unless the defender is present in person, there must be a charge: presence by an agent or other representative, though it will make the decree *in foro*, will not dispense with the necessity of a charge,—*Shiell* v. *Mossman*, 7 Nov. 1871, 10 M. 58; 44 J. 46.

(*o*) Formerly six.

(*p*) *I.e.*, if the charge is given on the 1st, execution may proceed on the 12th.

(*q*) In presence of a witness. For the Form for a charge, see Schedule A, No. 11.

(*r*) Arrestment does not preserve the vitality of the decree or charge, for arrestment does not, like poinding or imprisonment, certiorate the debtor.

Procurators not to appear without leave.

XIV. And be it enacted, That no procurators, solicitors, nor any persons practising the law, shall be allowed to appear or plead for any party (*a*) without leave of the Court (*b*) upon special cause shown (*c*), and such leave, and the cause thereof, shall in all cases be entered in the Book of Causes kept by the Sheriff Clerk (*d*); nor shall any of the pleadings be reduced to writing or be entered upon any record, unless with leave of the Court first had and obtained, in consequence of any difficulty in point of law or special circumstances of any particular case: Provided always, that when the Sheriff shall order any such pleadings to be reduced to writing (*e*), every case in which such order shall be made shall thenceforth be conducted according to the ordinary forms and proceedings in Civil Causes and in prosecutions for statutory penalties, and shall be disposed of in all respects as if this Act had not been passed (*f*).

No written pleadings, unless case sent to Ordinary Court.

(*a*) But he may appear and plead on his own behalf, or as assignee of the

pursuer,—*Kay* v. *Begg & Balfour*, 26 Jan. 1837, 15 S. 422; 9 J. 230; *Ritchie* v. *M'Lachlan*, 27 May 1870, 8 M. 815; 42 J. 477.

(*b*) Occasionally a party insists he has a veto on his adversary having the aid of or being represented by an agent: but he can only object; it is for the Court to judge in the matter. The Law Courts Commission in 1871 recommended that agents should be allowed to appear; and as the facts of the case are then more likely to be fully elicited, it is thought that the Court should, whenever expedient, allow an agent to appear if wished.

(*c*) Points of law of much delicacy often arise in the Small Debt Court, especially in shipping cases. In such instances the services of an agent are very expedient. Where a corporation is a pursuer or defender it would seem reasonable to allow it to be represented by its agent instead of some lay *employé*. Where the pursuer is a merchant in London, Liverpool, or some other town at a distance from the Court it would be absurd to insist on his personal attendance; and if he is to be represented by a mandatary there is no good reason why his lawyer, who perhaps is familiar with the case, should be ineligible. Again, if the party, though resident on the spot, be a woman, or a young or old person, to refuse to allow an agent may be either to make a party lose a case in which he is in the right, or to take an amateur lawyer as his representative. Where a party at a distance would be allowed personal charges (XIII, note (*g*)) if he came, it seems reasonable that if instead of doing so he costs less expense to the defender through employing an agent, some charge should be allowed.

(*d*) A common entry is "in respect of points of law."

(*e*) It is a common occurrence to bring a test case in the Small Debt Court; and if the decision of the case does not depend so much on the facts as on the construction of statutes or legal documents, written pleadings will probably be advisable.

(*f*) The order is to appoint the pursuer to give in a condescendence within so many days, and the defender his defences within so many days thereafter: and thereon the case will be sent to the adjustment roll and disposed of under the provisions of the Sheriff Courts Act of 1876. Appeal lies to the Sheriff; and in *Campbell* v. *Gillies*, 20 Sept. 1871, 44 J. 3; 2 Coup. 142, Lord Ardmillan held that a further appeal lies to the Circuit Court. The soundness of this decision, it is thought with much deference, is doubtful,—see section XXXI., note (*c*). The case when remitted to the Ordinary Court roll becomes an Ordinary Court case, and subject to the provision, applicable to all Ordinary Court cases not exceeding £25 in value, that it cannot be brought under review of the Court of Session or Court of Justiciary by appeal or in any other way,—16 & 17 Vict. cap. 80, sec. 22. The effect of his Lordship's judgment would be that a case over £12 but not over £25 could be appealed no further than the Sheriff; but one under £12 could be appealed to him on *every* ground, and from him to the Circuit Court, though only on the limited grounds applicable to Small Debt appeals. See further section XXXI., note (*c*). By section 2 of A. S. 4 Dec. 1878, it is provided that "when a case is removed from the Small Debt to the Ordinary Court, it shall be competent to the Sheriff to allow the business to be charged for according to the subjoined tables."

Parties not appearing or not re-

XV. And be it enacted, That any defender who has been duly (*a*) cited, failing to appear personally or by one of his

family, or by such person as the Sheriff shall allow (*b*), such person not being an officer of Court, shall be held confessed, and the other party shall obtain decree against him (*c*); and in like manner if the pursuer or prosecutor shall fail to appear personally or by one of his family, or by such person as the Sheriff shall allow (*d*), such person not being an officer of Court, the defender shall obtain decree of absolvitor, unless in either case a sufficient excuse for delay shall be stated (*e*), on which account, or on account of the absence of witnesses (*f*), or any other good reason (*g*), it shall at all times be competent for the Sheriff to adjourn any case to the next or any other court day (*h*), and to ordain the parties and witnesses then to attend (*i*).

Who presented to be held confessed.

Who may appear.

(*a*) As to the modes of citation, see section III., note (*j*).

(*b*) If a person appears for the defender whom the Court will not allow, the decree is in absence and may be sisted,—*Hill* v. *Campbell*, 10 March 1824, 2 S. 790. But if a representative appears for the defender whom the Court allows, he cannot withdraw from the case to the effect of making the decree in absence, except by the permission of the Court.

(*c*) For the sum claimed, with expenses of the witnesses and possibly personal charges. The roll is generally called twice,—see section XVII., note (*d*), —and if the defender does not answer, decree in absence is given; but if he arrive and intimate his presence to the Clerk of Court before the pursuer leaves the Court, it will be proper to hear the case in its turn.

(*d*) See note (*b*).

(*e*) A person may appear to ask for an adjournment of the case without being authorised or competent to conduct it for the pursuer—*e.g.*, a servant sent to explain her mistress's absence, in which event the Court will either refuse the adjournment and give decree in absence, or grant an adjournment; and in that case the defender will be marked as present per A.B., so as to enable the case to be called at the adjourned diet without further citation.

(*f*) As to the citation of witnesses, see section XII., note (*e*).

(*g*) *E.g.*, the probable length of the case, its unsuitability for trial *coram publico*, to enable an English or Irish pursuer to be present if the case is to be fought, or a Scotch defender, who is away from home, to return, &c.

(*h*) This is not to be read as meaning necessarily a diet of the Small Debt Court in that place,—see section XXVII. He is entitled to take the adjourned hearing on any day and either in Court or chambers as may be expedient,—*Weatherston* v. *Gourlay*, 13 April 1860, 3 Irv. 589.

(*i*) This saves the necessity of citing the witnesses of new. If any witness is unable to be present on the day named for the adjourned diet he should say so at the time: failing to do so or to appear he will be liable to be proceeded against as provided by section XII. If either party fails to attend at such diet, it has been questioned whether the decree thereon granted is in absence or *in foro*,—see *Rowan* v. *Mercer*, 12 May 1863, 35 J. 560; 4 Irv.

377. It is thought the decree cannot be safely treated as *in foro*,—for the cause is disposed of *parte inaudita*, and yet remedy would be impossible.

Defender may sist.

XVI. And be it enacted, That where a decree has been pronounced in absence (*a*) of a defender, it shall be competent for him, upon consigning the expenses decerned for (*b*), and the further sum of ten shillings to meet (*c*) further expenses, in the hands of the Clerk, at any time before a charge is given, or in the event of a charge being given before implement (*d*) of the decree has followed thereon, provided in the latter case the period from the date of the charge does not exceed three months (*e*), to obtain from the Clerk a warrant (*f*) signed by him sisting execution till the next court day, or to any subsequent court day to which the same may be adjourned, and containing authority for citing the other party, and witnesses and havers for both parties; and the Clerk shall be bound to certify (*g*) to the Sheriff on the next court day every such application for hearing and sist granted; and such warrant, being duly served upon the other party personally or at his dwelling place, in the manner provided in other cases by this Act (*h*), shall be an authority for hearing the cause; and in like manner, where absolvitor has passed in absence (*i*) of the pursuer or prosecutor, it shall be competent for him, at any time within one calendar month thereafter (*j*), upon consigning in the hands of the Clerk the sum awarded (*k*) by the Sheriff in his decree of absolvitor as the expenses for the defender and his witnesses, with the further sum of five shillings to meet (*l*) further expenses, to obtain a warrant (*m*), signed by the Clerk, for citing the defender and witnesses for both parties, which warrant, being duly served upon the defender in the manner provided in other cases by this Act (*n*), shall be an authority for hearing the cause as hereby provided in the case of a hearing at the instance of the defender, the said sum of expenses awarded (*o*) by the Sheriff, and consigned as aforesaid, being in every case paid over to the other party (*p*), unless the contrary shall be specially ordered by the Court (*q*); and all such warrants for hearing shall be in force, and may be served by any Sheriff officer (*r*) in any county, without indorsation or other authority than this Act (*s*).

Conditions.

Or pursuer.

Conditions.

Expenses awarded on first day to go to party present.

(*a*) Not absence in the sense of section XIII., but of section XV.

(*b*) These are afterwards conveniently termed the awarded expenses. Formerly the principal sum decerned for had to be consigned, and still has in the J.P. Court.

(*c*) The actual expenses may eventually prove more or less. In the former case the deficit will be decerned for; in the latter, the excess will be returned to the defender if successful, or will go in part extinction of the principal sum decerned for.

(*d*) Implement to any extent will prevent a sist so far as the defender who has implemented the decree is concerned; and if there are two defenders, and one was decerned against *in foro* and the other *in absentia*, the sist is competent only *quoad* the latter. Poinding is implement of the decree,—*Rowan* v. *Mercer*, 12 May 1863, 35 J. 560; 4 Irv. 377; and *Wyllie* v. *Lawson*, 16 Sept. 1863, 36 J. 1; 4 Irv. 441. The point is the subject of an instructive decision in the Sheriff Court of Lanarkshire in *French* v. *Jarvie & Smith*, 18 Dec. 1863, 3 Scot. Law Mag. 7. In *M'Lachlan* v. *Rutherford*, 10 June 1854, 16 D. 937; 26 J. 483, Lord Wood expressed the opinion that imprisonment is also implement of the decree.

(*e*) Calendar months. If the charge be given on 1st February, the decree can be sisted, unless implemented, till 1st May inclusive. If a year expire after the charge without implement, the decree cannot be operated on till a new charge is given (section XIII.), and the three months for sisting will run from the date of this second charge—*Lochie* v. *Brown*, 28 April 1863, 35 J. 461; 4 Irv. 363.

(*f*) A Form will be found at the end of the Schedules.

(*g*) By putting the case on the roll,—generally after the new cases.

(*h*) Section III.

(*i*) See note (*a*).

(*j*) If the decree absolvitor be granted on 31st January, the pursuer can sist up till the last day of February. The period allowed for sisting execution is shorter in the case of a pursuer, for he chose the day to suit his own convenience, and cannot but know of the case being in Court, whereas it is possible a defender may have failed to know.

(*k*) The awarded expenses. See *infra*, note (*o*).

(*l*) See note (*c*).

(*m*) See note (*f*).

(*n*) Section III.

(*o*) Not the 10s., or 5s., consigned to meet further expenses—the Sheriff does not award these—but the expenses awarded when the decree in absence was pronounced.

(*p*) If a party sists and gains the cause, the judgment to be pronounced will sustain the sist, recall the decree, and decern, or assoilzie. The expenses of the party successful ultimately will consist solely of those of the second day under deduction of those awarded on the first day. Hence in the one case the pursuer loses the expenses of a successful summons; and in the other the defender pays the cost of an unsuccessful one. If the expenses of the first day exceed those of the second, the pursuer, if ultimately successful, will have such excess deducted from the principal sum to which he is held entitled; while if the defender is ultimately successful, the excess will be appointed to be paid to the pursuer. In both cases the *consigned* money, or the balance, will go to the successful party.

On the other hand, where a party sists and loses, the sist will be sustained, and decree *in foro* granted. To this result there will in general be no objection, for it is a better decree for the party to have. But if he has used arrestment on the decree in absence, the matter is somewhat important, for if the decree is recalled, the arrestment will fall. It is obvious that if the defender's position is improved under the sist, the decree will be different. But if the same result is arrived at on the merits, then the only differences are that the expense are greater, and that the decree is *in foro*, and will not require a charge if the defender was personally present. Practically the only material difference is as regards the extract. But it seems undeniable that in the first place the sist must be sustained or dismissed; then the decree must be recalled, as provided in regard to reponings under section 14 of the Sheriff Courts Act of 1876, or the case cannot be heard. It is not like an appeal; for the question is not whether the judgment is sound or unsound; but it is "the hearing" of the cause. It is rarely that the matter is of moment, but the difficulty has occurred, and Sheriffs have been got to adhere to the decree in absence; but it has been felt that such a course was of doubtful propriety. Some forms for interlocutors dealing with sists, for which I am indebted to Mr Sellar's valuable Book of Judicial Forms, will be found after the Schedules.

If in the case above supposed the sister loses he will have to bear the expenses of the second day; and the consigned money will be paid to the successful party in *pro tanto* extinction of the sums awarded to him, and the balance, if any, to the sister.

(*q*) *E.g.*, on the ground of illness. But it is very desirable for many reasons that the statutory rule should be departed from as seldom as possible: sists can be made a means of oppression.

(*r*) Or enrolled law-agent,—45 & 46 Vict. cap. 77, sec. 3.

(*s*) In regard to this important section five matters may be noticed.

1. If decree pass in absence against A, and he die and it be sought to constitute the award by a decree conform, as pointed out in section II., note (*c*), 6, against his representative, it is doubtful whether the latter is not entitled to obtain a sist, where competent, and try and get the decree recalled,—*Pearson & Jackson* v. *Alison*, 31 Jan. 1871, 9 M. 473; 43 J. 279.

2. Each party may sist the case only once,—*Harris* v. *Connell*, in the Sheriff Court of Lanarkshire, 18 Sept. 1877, Guth. 419; 21 J. of J. 582; but if a second sist be applied for at a different stage probably this rule would not, it is thought, be in point. But if the defender sisted and then the pursuer (which is competent,—*Grange* v. *M'Kenzie*, 28 Sept. 1866, 5 Irv. 324), the defender cannot again sist; for if he could, the see-saw might go on indefinitely, and the second sist would present the cause at the same stage as the former sist.

3. The sist is the warrant of the Clerk on behalf of the Court, and does not affect the decree but only the execution of it. But although the issuing of the sist is the function of the Sheriff Clerk, it would seem not incompetent for him to avoid responsibility in case of error by consulting the Sheriff,—*Jaffray* v. *Carswell*, 7 July 1835, 13 S. 1048; 7 J. 491; and the Sheriff could there and then hear the applicant, or recommend the sist to be issued and defer deciding the matter till the case comes up in Court on the sist. It has been already stated (XV. note (*i*)), that where a case has been adjourned in presence of both parties and one of them is absent at the adjourned diet, the decree thereon granted may be sisted. But in any event the sist, though granted

in dubio by the Clerk of Court, may be objected to and held incompetent when the case comes up on the sist.

4. As just explained, the mere issuing of a sist is no pledge that the case will be gone into. The Clerk of Court may not know of the implement that has taken place; and even where implement has not taken place when the sist was issued, if it occur before the sist is served, it has been held, in Forfarshire, following *Ritchie* v. *Dunbar*, 28 Feb. 1849, 11 D. 882, that the sist must be dismissed,—*Mackenzie* v. *Ross*, March 1869, Guth. 427.

5. If decree has passed in absence of a defender, his remedy is to sist, and not to suspend the decree,—*Turnbull* v. *Russell*, 15 Nov. 1851, 14 D. 45; 24 J. 9; nor to reduce the decree,—*Smith* v. *M'Gavin*, 1 April 1864, 3 Scot. Law Mag. 68; nor to interdict execution of the decree,—*Spalding* v. *Valentine*, 4 July 1883, 10 R. 1092; 20 S. L. R. 724; nor to claim damages,—*Crombie* v. *M'Ewan*, 17 Jan. 1861, 23 D. 333; 33 J. 167. See cases noted on the foregoing points under section XXX., note (*e*).

Book of causes, &c., to be kept.

XVII. And be it enacted, That the Sheriff Clerk shall keep a book, wherein shall be entered all causes conducted under the authority of this Act (*a*), setting forth the names and designations of the parties, and whether present or absent at the calling of the cause, the nature and amount of the claim and date of giving it in, the mode of citation, the leave and cause of procurators' appearance, the several deliverances or interlocutors, and the final decree, with the date thereof (*b*), which book shall be signed each court day by the Sheriff (*c*); and the said entries by the Clerk shall be according to the form in Schedule (F.) annexed to this Act, or with such addition as the Sheriff shall appoint; and the Sheriff Clerk shall also keep a book or books containing a register or registers of all indorsations of decrees and warrants issued in other counties, and of all warrants for arrestment on the dependence, and of all loosings of arrestment, and of all reports of poindings or sequestrations and sales of goods and effects, which registers shall be open and patent at office hours to all concerned, without fee; and the Sheriff Clerk shall cause a copy of the roll of causes to be tried on each court day to be exhibited to the public on a patent part of the court house at least one hour before the time of meeting of such Court, and which shall continue there during the time the Court shall be sitting; and the Sheriff Clerk, or an officer of Court, shall audibly call the causes in such roll in their order (*d*).

Register of indorsations, arrestments, poindings, &c.

Calling of roll.

(*a*) This will not include summary removings, but only such causes as are directed to be determined in the Small Debt Court.

(*b*) If, as is often expedient, a case is adjourned to a diet in chambers, and if there be more Sheriffs than one, so that the Court Book is required in the public Court, it will be found convenient to have a special book for such chamber diets.

(*c*) The Clerk writes a docquet if there are any decrees payable by instalments. It is sufficient if the Sheriff sign this docquet, or, if there is none, after the last decree. If there are any alterations made on the book by the Clerk, the Sheriff will initial them. For a Form of docquet, see the Supplementary Forms after the Schedules. The entries made in the book, though complete in themselves, need not be more than mere jottings—*e.g.*, Decerns with 5s. of expenses; *or*, Decerns with 5s. of expenses payable by instalments of 2s. 6d. per week; *or*, Decerns with 15s. of expenses, and Grants Warrant of Sale; *or*, Assoilzies with 3s. 6d. of expenses; *or*, Dismisses with 5s. of expenses in favour of defender, for which decerns.

(*d*) Any case may be called out of its order, on cause shown, by direction of the Sheriff,—section XXXIII. A fee of one penny is payable for the calling of each cause,—section XXXII. There are three modes variously in use of calling the causes. (1) In some Courts each cause is heard as it called; (2) in others the roll of causes is called and where one party is absent the other at once obtains decree, and thereafter the cases in which both parties appeared are heard in turn; and (3) where the double diet system prevails, the parties come forward in each case as it is called, the Sheriff ascertains the defence and jots it on the back of the Summons, and if witnesses are required the case is disposed of at the next diet of Court, but if none are needed it is thereon heard and determined. Each form has its advocates; but the advantages of the second and third are so great compared with those of the first that its use cannot be recommended. In calling the roll it is necessary (section XXXIII.) and desirable that the number of the case should be called as well as the name of the parties: in a crowded and perhaps noisy Court especially, the number sometimes materially aids the Clerk of Court or a party to ascertain what the case is, or to let the latter know if his case is at hand.

Payment by instalments.

XVIII. And be it enacted, That the Sheriff may, if he think proper (*a*), direct the sum or sums found due to be paid by instalments weekly, monthly, or quarterly, according to the circumstances of the party found liable (*b*), and under such conditions or qualifications as he shall think fit to annex (*c*).

(*a*) The granting of this indulgence is purely a matter of discretion, to be exercised according to the circumstances of each case; though, from the unfortunate laxity frequently shown in administering this provision, there is little doubt that a great many of the more ignorant class of debtors have come to think they are entitled to the indulgence as a matter of right. It is not uncommon to hear a litigant to whom this privilege is refused declare that in consequence he or she won't pay. If a pursuer gets goods for which he knows he cannot pay, the act is so obviously a fraud that granting of the indulgence would be misplaced; while if he can pay, the same is true. To interfere therefore between the creditor and his rights,—especially considering

how small and troublesome the compulsitor of payment is now, and that the indulgence is generally granted solely on the debtor's version of his affairs, which though plausible enough is often untrue,—is frequently to punish the innocent party, and perhaps cause him pecuniary embarrassment.

It is thought that the only occasions on which, as a rule, it is safe to interfere between the creditor and his debtor are (1) if the debtor through his own illness has been disabled from earning the money with which he expected to pay the debt; or (2) if illness or death in his family, or some such calamity, has in this unforeseen manner created a greater need which has exhausted his earnings; or (3) if the debt was contracted under an arrangement that it should be paid by instalments, which might yet be nearly adhered to; or (4) if from some unusual conjuncture of circumstances the debtor has through no fault of his own been unable to get work.

On the other hand there are certain classes of cases in which experience has shown that it is generally unsafe for the Court to interfere—namely, (1) where the debt is of some standing, for there the creditor has already given time and it is not intended the Court should give more; (2) where the money is owing for goods supplied to the debtor's shop, for it is not just that he should hold them up for a better price at the expense of making his creditor get a worse one than he sold them for, which prolonging the credit amounts to; (3) where the money owing was borrowed and was to be repaid in a slump sum, for that would be causelessly to make a different bargain for the parties, and the debtor was *lucratus* by the loan; and (4) where the inability of the debtor to get work is owing to his going on strike, for, presumably, his object in doing so was to get better wages, and he is not entitled to better his own position at his creditor's expense and without first paying his debts. In such cases it is better to leave the debtor to arrange the best terms he can with his creditor. Such a rule systematically followed tends to keep those who are improvident from running into debt; while the idea that they have even a chance of being left to pay in dribblets is unquestionably to some a temptation to the opposite course. Payment by instalments cannot be granted, except of consent, in the case of a sequestration, for it stops the sale: but the case may be continued for payment to be made in a specified way, and if this is not done, the case can then be enrolled for a warrant of sale.

(*b*) The amount and character of the debt are generally deserving of consideration in determining what is proper. Less than a shilling in the pound per week is seldom advisable. Aliment will almost always be fitly ordered to be paid in instalments; and it is desirable to settle with the parties where it is to be paid, and whether, as usual, the pursuer is to come for it, or it is to be sent. This can be jotted on the back of the summons, but need not enter the decree. The instalments decerned for should be made payable on the day the defender gets his pay.

(*c*) In order to enforce due payment of the instalments it is generally advisable to declare that if one instalment is allowed to run unpaid into another the indulgence granted is to cease and the remainder of the debt to be payable at once. This means that two instalments must be allowed to become due,—*Reid* v. *Wilkie*, 10 March 1861, Guth. 420. Alimentary instalments will be excluded from this condition. The conditions of the indulgence will be announced orally, and engrossed in the docquet at the end of the roll; or they may be made a standing rule of Court and passed

through the Act Book. The former plan is equally convenient and on the whole probably better.

Decrees may be enforced in any other county.

XIX. And be it enacted, That any decree obtained under this Act may be enforced where competent against the person or effects of any party in any other county as well as in the county where the decree is issued: Provided always, that such decree, or an extract thereof (*a*), shall be first produced to and indorsed (*b*) by the Sheriff Clerk of such other county, who is hereby required to make such indorsement on payment of the fee herein-after mentioned (*c*).

(*a*) The decree, not the extract, is the warrant of diligence,—*Sinclair* v. *Rosa*, 25 April 1863, 35 J. 511; 4 Irv. 390; and *Graham* v. *Bell*, *infra*. Unless, therefore, as in *Henderson* v. *Clark*, 18 Nov. 1871, 10 M. 104, 44 J. 73, the whole steps of diligence are written on the one sheet of paper, any error in the important details will be fatal. Thus in *Graham* v. *Bell*, 15 July 1875, 2 R. 972, where an execution of arrestment specified 13th instead of 30th January as the date of the decree warranting the arrestment, although the date of extract was correctly given, the arrestment was held bad.

(*b*) "Indorsed by me in terms of the statute," A.B., Sheriff Clerk of, &c.

(*c*) One shilling,—section XXXII.

Appraisement and sale of poinded and sequestrated effects.

XX. And be it enacted, That the sequestration or poinding and sale shall be carried into effect (*a*) by the officer in a summary way, by getting the effects sequestrated or poinded duly appraised (*b*) by two persons (*c*), who may also be witnesses to the sequestration or poinding (*d*) and leaving an inventory or list (*e*) thereof for the party (*f*) whose effects are sequestrated or poinded, and not sooner than forty-eight hours thereafter carrying such effects to the nearest town or village, or, in case the sequestration or poinding shall take place in a town or village, to the cross or most public place thereof, and selling the same to the highest bidder by public roup between the hours of eleven forenoon and three afternoon at the cross or such most public place, on previous notice of at least two hours by the crier, but reserving to the Sheriff, by such general regulation or special order in any particular case (*g*) as he shall think fit, to appoint a different hour or place for the sale or a longer or different kind of notice to be given of the time of selling; and in sequestrations and poindings the overplus of the price, if there shall be any, after payment of

Mode.

the sums decerned for, and the expenses, if expenses are awarded, including what is allowed by this Act (*h*) for sequestration or poinding and sale, shall be returned to the owner or consigned with the Sheriff Clerk if the owner cannot be found; or if the effects are not sold (*i*) the same shall be delivered over at the appraised value to the creditor to the amount of the sum decerned for and expenses, if awarded, and the allowances for sequestration or poinding and sale; and a report of the proceedings in the sequestration or poinding and sale and proceeds, or of the delivery of the effects, shall in every case be made by the officer to the Sheriff Clerk within eight days (*j*) thereafter, agreeably to the form in Schedule (G.) annexed to this Act, or to the like effect; and where the Sheriff shall order (*k*) a sale of goods or effects arrested, the same course of proceeding shall be adopted as is above directed in the case of poinding and sale; and no officer to whom the enforcement of decrees or warrants in cases falling under this Act may be committed shall be liable to any penalty, fine, or punishment for selling goods or effects under authority of such decrees or warrants by public auction, although such officer may not be licensed as an auctioneer, anything in any Act or Acts to the contrary notwithstanding; and (*l*) if any person shall secrete or carry off or intromit with any poinded or sequestrated effects *in fraudem* of the poinding creditor's or of the landlord's hypothec, such person shall be liable to summary punishment by fine or imprisonment, as for contempt of Court (*m*), either at the instance of the private party, with or without the concurrence of the Procurator Fiscal, or at the instance of the Procurator Fiscal, or *ex proprio motu* of the Sheriff, besides being liable otherwise as accords of law.

Surplus to be returned or consigned.

Unsold effects to go to creditor.

Report of poinding, &c.

Sale by order of Court.

Breach of poinding.

(*a*) If it be needful the Sheriff can grant warrant to open doors,—*Scott* v. *Lethem*, 23 May 1846, 5 Bell App. 126; 18 J. 421. Forms of application will be found after the Schedules.

(*b*) In *Le Conte* v. *Douglas*, 1 Dec. 1880, 8 R. 175; 18 S. L. R. 163, Lord Craighill was of opinion that the appraisers must be put on oath. If they are not put on oath, it is obvious that the report cannot be made in terms of Schedule G, which requires the officer to report that the effects were "duly appraised on oath." The name of the creditor or the amount of the debt do

not require to be stated in the schedule of poinding,—*Crombie* v. *M'Ewan*, 17 Jan. 1861, 23 D. 333; 33 J. 167. The effects must not be poinded extravagantly in excess of the debt,—*M'Kinnon* v. *Hamilton*, 21 June 1866, 4 M. 852; 38 J. 445; nor in slump,—*Le Conte* v. *Douglas*, *ut supra*.

(*c*) See section V., note (*g*).

(*d*) If there prove to be no effects to poind or sequestrate, no witness to the report is needed,—*Scott* v. *Lethem*, note (*a*) *supra*.

(*e*) As in Schedule G.

(*f*) As to the proper course to be followed where a third party claims the poinded goods as his, see *Macleod* v. *Aitken*, in the Sheriff Court of Lanarkshire, 11 Feb. 1881, 25 J. of J. 387. If there is any irregularity in the poinding the officer and his cautioners will be liable to the party prejudiced; but if his procedure is regular and the warrant on which he acts *ex facie* valid, he and his cautioners cannot, it is thought, be held liable or be validly called in any action for reparation brought by a person injured through no fault of his. In the Sheriff Court this has been matter of frequent decision, and any other result would lead to this anomalous result that if the officer refused to execute his statutory duty he would be liable in damages and to suspension or deprivation of office (section XXXIV.), while if he did execute it, he would also be liable. On the other hand if the officer commits some irregularity, though the question of whether his employer will be responsible therefor to the party prejudiced, if he do not adopt the officer's proceedings, was left open in *Le Conte's* case, it is thought that he must be held responsible, just as in the case of his law-agent,—*Smith* v. *Taylor*, 8 Dec. 1882, 10 R. 291; 20 S. L. R. 216, —for the diligence is done at his instance and for his benefit.

(*g*) *E.g.*, if the goods are so heavy or so bulky that their removal would be unduly costly in proportion to what they would fetch; or where the goods would command a larger price if sold at the spot, or at some other particular place; or would be injured by removal, or by delay in selling.

(*h*) Section XXXII.

(*i*) At the appraised value: they cannot be sold for less.

(*j*) See section V., note (*i*).

(*k*) In a furthcoming or multiplepoinding.

(*l*) This provision was not contained in the earlier Small Debt Statutes.

(*m*) It is much better to sue him for damages, unless it is wished to have the special articles restored. If the debtor or tenant be himself the intromitter, it is obvious that the imposition of a fine, which will not go into the creditor or landlord's pocket, will not be the most prudent remedy.

One witness sufficient.

XXI. And be it enacted, That in all charges and arrestments (*a*) and executions of charges and arrestments, under this Act, one witness shall be sufficient, any law or practice to the contrary heretofore notwithstanding.

(*a*) By 34 & 35 Vict. cap. 42, sec. 4, it is provided that a witness or concurrent shall only be necessary in the case of poinding, sequestrating, or charging.

Actions for damages by riot

XXII. And be it enacted, That all actions of damages for compensation for loss or injury by the act or acts of any

unlawful, riotous, or tumultuous assembly in Scotland, or of any person engaged in or making part thereof, authorised to be brought by an Act passed in the third year of the reign of his Majesty King George the Fourth (*a*), where the sum concluded for does not exceed twelve (*b*) pounds sterling, as also all actions for recovery of assessments by virtue of an Act passed in the ninth year of his said Majesty's reign (*c*), intituled An Act for the Preservation of Salmon Fisheries in Scotland, may be heard and determined in the summary way provided by this Act, and this notwithstanding the amount of such assessments shall exceed twelve pounds sterling.

and for fishery assessments may be determined under this Act.

(*a*) By section 10 of the Act—3 Geo. IV. cap. 33—the action required to be brought in the Justice of Peace Small Debt Court where the sum claimed did not exceed £5, and in the Sheriff Small Debt Court where it did. But under the above provision the claim, however small, may be made in the Sheriff Small Debt Court. The action must be brought within one month of the date of the injury in order to obtain the benefit of the provisions of the Act.

(*b*) Extended from £8, 6s. 8d.,—see section II., note (*g*).

(*c*) 9 Geo. IV. cap. 39. These are assessments on the real rent imposed by the majority present at a meeting of the proprietors of salmon-fisheries in any river, lake, or estuary communicating therewith, and are to be recovered at the instance of any clerk or other person authorised by such meeting.

XXIII. And whereas by an Act passed in the twentieth year of the reign of his Majesty King George the Second, for taking away and abolishing the heritable jurisdictions in Scotland, it is provided (*a*) that Sheriffs may hold itinerant Courts at such times and places within their respective jurisdictions as they shall judge expedient, or as shall be directed or ordered by his Majesty, his heirs and successors, and by the said recited Act of the tenth year of the reign of his Majesty King George the Fourth (*b*), provision is made for the necessary accommodation for holding Courts for the purposes of the said Act, which the Sheriff should judge it expedient to hold at other than the usual places for holding the same: And whereas it is expedient to make better provision for holding itinerant or Circuit Courts for the purposes of this Act; be it enacted, That the several Sheriffs of the several sheriffdoms in Scotland shall, in addition to their ordinary Small Debt Courts, by themselves (*c*) or their Sub-

Circuit Small Debt Courts

to be held on specified days.

stitutes, hold Circuit Courts, for the purposes of this Act, at such of the places within each sheriffdom set forth in the schedule (H.) annexed to this Act, and for such number of times within each place in each year, not exceeding the number of times mentioned in the said Schedule (H.) as shall be directed by warrant under her Majesty's sign manual, and to be published in the 'London Gazette,' at such times as they shall deem best and most convenient to fix for the general business of the county, if there shall be any cause at such places at such times to try (*d*), but as nearly as may be at equal intervals between each Court, except as hereinafter provided (*e*), and shall remain at each such place until the causes ready to be heard shall be disposed of (*f*); and each Sheriff Clerk, or a Depute appointed by him, is hereby required to attend at such places and times within his sheriffdom, and to find the necessary accommodation for holding all such Courts, on his own charges and expenses, in respect of the fees allowed by this Act (*g*): Provided always, that no Sheriff Clerk shall acquire a vested right to any increased amount of fees or emoluments to be drawn under this Act, or shall be entitled to compensation in consequence of being deprived of such increased amount of fees or emoluments, or of any future regulation thereof by any Act to be hereafter passed.

Sheriff Clerk or Depute to attend.

(*a*) Cap. 43, sec. 29.

(*b*) Cap. 55.

(*c*) By 16 & 17 Vict. cap. 80, sec. 46, it is enacted that "each Sheriff shall, once in the year, go on the Small Debt Circuit in use to be held by the Sheriff-Substitute, and shall on such occasions, in addition to holding the Small Debt Court, despatch as much of the ordinary business as may be ready for adjudication, or as time may permit." This provision is not to apply to Orkney and Shetland, Mid-Lothian, and Lanark. Between 13th and 22d November each Sheriff must annually make a return to the Home Secretary of his sitting and the period of its holding, stating the cause of absence in case of his not holding it.

(*d*) If no summonses or sists have been issued and no continuations granted, it will not be necessary to go.

(*e*) Section XXIV.

(*f*) Note the power of adjourning under sections XV. and XXVII.

(*g*) Section XXXII.

XXIV. And be it enacted that the several Sheriffs of the

several sheriffdoms, with the consent and approbation of one of her Majesty's Principal Secretaries of State, may from time to time change the places or number of times (*a*) at which such Circuit Courts shall be directed to be held as aforesaid (*b*), or discontinue the same or any of them in any sheriffdom in which such Circuit Courts or any of them may be found unnecessary or inexpedient (*c*), or direct any two of such Courts held in islands or other places where it may be deemed expedient to be held at short intervals from each other, or direct Circuit Courts to be held at such places in any sheriffdom, although not mentioned in the said Schedule (H.), or in such additional places in counties mentioned in the said schedule, as may seem necessary and proper; and all such additional Circuit Courts shall be held in terms of the provisions and directions of this Act.

Sittings of Circuit Small Debt Courts may be altered.

(*a*) *E.g.*, in the event of increase or decrease of population or business there or elsewhere in the county.
(*b*) Section XXIII.
(*c*) Through paucity of business, inconvenience of access, &c.

XXV. And be it enacted, That the Sheriff Clerk of each sheriffdom shall attend personally, or appoint a Depute to act (*a*) at each of the places at which Courts may be directed to be held in terms of this Act, and such Depute shall, in the absence of the Principal Clerk, attend at and during the holding of such Circuit Courts, and shall thereat perform all the duties by this Act required to be performed by the Sheriff Clerk; and if such Depute shall not be resident in such place (*b*), the Sheriff Clerk may also appoint a proper person resident (*c*) in such place, or in its immediate vicinity, to issue the summonses or complaints which may be applied for and issued under the provisions of this Act, and the Principal Clerk shall give or cause to be given due intimation of the name, description, and residence of each person so appointed Depute Clerk, and of the person appointed to issue summonses and complaints as aforesaid, by notice in the form set forth in Schedule (I.) hereunto annexed, and which notice, being signed by the Sheriff Clerk shall, without being stamped, be a sufficient com-

Sheriff Clerks to appoint Deputes, and to give notices.

Special person may be appointed to issue claims.

mission to such Sheriff Clerk Depute, and such notice, or a copy thereof, shall be affixed on or near the doors of the church of the parish within which such Court is to be held, and also, if he shall see cause, by advertisement in the newspaper or newspapers of the greatest reputed circulation in the neighbourhood, and notice shall in like manner be given by the Sheriff Clerk, in the form of Schedule (K.) hereunto annexed, of the times at which such Circuit Courts shall be fixed to be held (*d*): Provided always, that no person who shall act as Depute Clerk for the purposes of this Act, and for no other purposes, shall be thereby disqualified from acting as a procurator before any Court, except the Small Debt Court in which he shall act as aforesaid, or from being registered or from voting under any Act or Acts of Parliament relative to the election of Members of Parliament or of magistrates of burghs (*e*).

Depute Clerks not disqualified as procurators in other Courts.

(*a*) Not necessarily to reside: he may go the Circuit with the Sheriff.

(*b*) To appoint too many Deputes, with the consequent responsibility and expense, would be undesirable.

(*c*) A stationer, or other superior tradesman, who can readily and constantly be found, or a Bank Agent, Registrar of Births, &c., Inspector of Poor, or the like, will be found a convenient and suitable person. If a procurator be appointed, as is done in some counties, to act as Depute Clerk under the Small Debt Act he cannot practise in the Small Debt Court, as afterwards provided by the section.

(*d*) The notice of the Sheriff's quarterly ordinary Courts is by 1 & 2 Vict. cap. 119, sec. 2, directed to be given fourteen days previously.

(*e*) If he is a party, other than a nominal raiser, to any action, he cannot *quoad hoc* act as Depute Clerk of Court,—section III., note (*d*). If necessary an interim appointment for the case could be made by the Sheriff; but the natural course would be for the Sheriff Clerk to attend himself or send some other Depute.

Districts for Circuit Courts to be fixed,

XXVI. And be it enacted, That each Sheriff shall, three months before holding any Circuit Court in terms of this Act, by a minute entered in the Sederunt Book of his Court, and published in such manner as he may think proper, and of which a printed copy shall be publicly affixed at all times on the walls of every Sheriff Court room within his sheriffdom (*a*), apportion the parishes or parts of parishes which shall, for the purposes of this Act, be within the jurisdiction of any Small Debt Court, to be

held within his sheriffdom as aforesaid, and thereafter from time to time alter such apportionment as the circumstances may require, and such alteration shall be published as aforesaid for at least three months before the same shall take effect, and all causes shall be brought before the Ordinary Small Debt Court, or any Circuit Small Debt Court within the jurisdiction of which the defender (*b*) shall reside, or to the jurisdiction of which he shall be amenable (*c*): Provided always, that if there shall be more defenders than one in one cause of action who shall be amenable to the jurisdiction of different Courts, or if from any other cause (*d*) the Sheriff shall be satisfied that such course shall be expedient for the ends of justice, it shall be competent to the Sheriff, upon summary application in writing (*e*) made by or for any pursuer, lodged with the Sheriff Clerk, or upon verbal application made by or for any pursuer in open Court, to order a summons or complaint to be issued, and the cause to be brought before his Ordinary Small Debt Court, or before any of his Circuit Small Debt Courts, as shall appear most convenient; and such summons or complaint shall be issued accordingly on the Sheriff writing and subscribing thereon the name of the Court before which the same is to be heard (*f*).

but may be altered.

Court in which action is to be brought.

A different Court may be allowed.

(*a*) It is thought this means the county in which the parishes are, and not all the counties which by subsequent legislation have been subjected to his jurisdiction. See section XXXVII.

(*b*) In the case of a furthcoming, the arrestee's residence determines the jurisdiction,—see section IX.; in the case of a multiplepoinding, that of the holder of the fund,—see section X.

(*c*) In *Stewart* v. *M'Gregor*, 23 Sept. 1868, 40 J. 654; 1 Coup. 92, this provision was held to leave the option to the pursuer to convene the defender either in the principal Court, or in the Circuit Court. The considerations which lead to this result are well stated in the note to the judgment of the late Sheriff Bell given in the appeal and approved by the Lord Justice-Clerk.

By the Act 33 & 34 Vict. cap. 86, several combinations of counties under one jurisdiction were made; and by section 12 it is provided that such union "shall be deemed to be a complete union to all intents and purposes in so far as regards the jurisdiction, powers and duties of the Sheriff and his Substitutes, and in so far as regards the powers, duties, rights and privileges of procurators before the Courts of the Sheriff. And the several counties of any such united sheriffdom shall not thereafter be regarded as separate sheriffdoms or jurisdictions, but as one sheriffdom and jurisdiction, in so

far as regards the powers, duties, rights and privileges of the Sheriff and his Substitutes and the procurators of the Sheriff's Court."

In construing this clause, it has been held in Aberdeenshire, by the Sheriff and one of his Substitutes, that this did not authorise the citing of a person resident in Kincardineshire to a Court to be held at Aberdeen; while the other Substitute takes a different view,—see *Clark* v. *Lumsden*, 11 Aug. 1881, 25 J. of J. 502. It may be doubted whether the Legislature intended that a debtor resident at Elgin might be cited to defend a claim in Lochmaddy, or one from Lerwick to attend at Wick. Such a mode of working the Act might obviously be made a means of oppression or even extortion, and would benefit pursuers alone. It is, however, to some extent countenanced by the refusal of the Court to suspend a decree in absence pronounced against a Glasgow debtor in a Small Debt Court at Hamilton to which he was cited,—*Jaffray* v. *Waddell*, 22 Nov. 1827, 6 S. 99; 3 F. C. 158. But the Court had some difficulty in arriving at this result; and it is important to notice that, as the decree had been allowed to pass in absence, the case was open to the remark that, as held in various cases noted under sections XVI., note (*s*), and XXX., note (*e*), the suspender's proper course was to appear and state his objection. There was, of course, no defect of jurisdiction on the Sheriff's part. In practice in Lanarkshire, no defender is cited to the Court of a ward of the county in which he does not reside without leave granted or his consent obtained; or, if it escape notice and he object, the case is remitted to the proper forum.

(*d*) *E.g.*, popular excitement, convenience of parties or of witnesses, or of agents, if it is a question of law.

(*e*) *E.g.*, "The applicant, James Duff, fruiterer, High Street, Perth, being about to raise an action for the sum of £10 against Robert Wilson, gardener, formerly in Crieff, but now in Callander, for injury done by him last summer to an orchard at Crieff of which he had a lease for some months, respectfully prays the Sheriff to order a Summons to be issued against the said Robert Wilson and the cause to be brought before the Circuit Small Debt Court to be held at Crieff, in respect that owing to the residence of all the witnesses in the cause at Crieff it will be the most convenient place for the trial of the cause. Jas. Duff."

(*f*) "Perth, 31 July 1883.—Grants for the next Court at Crieff.

"Hugh Barclay."

Sheriff may adjourn causes to any of his other Small Debt Courts.

XXVII. And be it enacted, That the Sheriff may, where the ends of justice and the convenience of the parties require it, adjourn and remove the further hearing of or procedure in any sequestration, multiplepoinding, or any other cause, from his Ordinary Small Debt Court to any of his Circuit Small Debt Courts, and from any of his Circuit Small Debt Courts to his Ordinary or any other Circuit Small Debt Court, or to any diet of his ordinary Court, to be there dealt with according to the provisions of this Act, or to any other time or place specially appointed for the

purpose (*a*); and such order of adjournment and removal shall be held due notice to the parties of such adjournment (*b*) and removal being made unless further notice shall be ordered.

(*a*) See section XV., note (*h*).
(*b*) See section XV., note (*i*).

Sheriff of Moray may hold Courts at Grantown.

XXVIII. And whereas in the upper district of Morayshire which borders on the river Spey, there is no place in which Circuit Courts can be conveniently held, but such Court could be conveniently held in the village of Grantown, situated in a detached part of the county of Inverness, in the immediate vicinity of the said district of Morayshire; be it therefore enacted, That in case it shall be directed by one of her Majesty's Principal Secretaries of State that a Circuit Court should be established in terms of this Act for the upper district of Morayshire, it shall be competent to the Sheriff of Morayshire, or his Substitutes, to grant warrants and to hold Courts for the trial of all causes competent under this Act, and to pronounce judgment therein, within the said village of Grantown, in the same way and to the same effect in all respects as if such Courts were held and warrants were granted and judgments pronounced within the said county of Moray; and it shall also be competent to the Sheriff Clerk and officers of Morayshire to issue summonses and perform other duties authorised by this Act within the village of Grantown in like manner as within the county of Moray.

(*a*) This provision is carried still further by the 2d section of the Act, 38 & 39 Vict. cap. 81, which authorises a Principal Secretary of State to direct a S. S. to act in a conterminous county, and such direction is to be equivalent to a commission in his favour over such county.

Sheriff and Sheriff Clerk's expenses at Circuit Courts.

XXIX. And be it enacted, That an account of the travelling and other charges incurred by the Sheriff (*a*) and Sheriff Clerks in going to, living at, and returning from the places where such Circuit Courts shall be held as aforesaid shall be rendered annually in Exchequer with the other charges of the Sheriffs, and such accounts being there audited shall be allowed to an amount for the Sheriff not

exceeding five pounds, and for the Sheriff Clerk not exceeding one pound ten shillings for each Court, and paid out of the public revenue of Scotland as the charges of the Sheriffs are in use to be paid.

(*a*) Under the revision of salaries consequent on the 37th section of the Act 16 & 17 Vict. cap. 80, and the 39th section and relative Royal Warrant of 3d Jan. 1854, granting the increased salaries, these charges are no longer payable by Exchequer but have to be borne by the Sheriff. Those of the Sheriff Clerk still remain. Where a Sheriff Clerk is put on salary, instead of being remunerated by fees, under 1 & 2 Vict. cap. 119, sec. 28, "any surplus of such fees and emoluments, after satisfying such salaries, shall be applied towards defraying the expenses attending the establishment of the Sheriff Court and Sheriff Small Debt Circuit Courts within the county in which such fees and emoluments shall be collected."

Decree not subject to review, except as hereby provided.

XXX. And be it enacted, That no decree (*a*) given by any Sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension (*b*), or appeal (*c*), or any other form of review (*d*), or stay of execution, other than provided by this Act (*e*), either on account of any omission or irregularity or informality in the citation (*f*) or proceedings, or on the merits, or on any ground or reason whatever.

(*a*) The protection given is to the decree,—not to what follows on it, so far as such subsequent procedure is impugned on grounds which do not challenge the validity of the decree itself. If the proceedings anterior to the decree are to be impugned, it can be done only in the manner and subject to the restrictions provided by section XXXI.

(*b*) Under the 26th section of 16 & 17 Vict. cap. 80, the Legislature, in extending the jurisdiction of the Small Debt Court from £8, 6s. 8d. to £12, enacted that a party imprisoned under a decree for a sum falling within the extended limit shall be entitled to bring such decree under review of the Sheriff by way of suspension and liberation by a summary petition.

(*c*) In an action for damages under the Game Laws Amendment Act of 1877, appeal is competent to the Sheriff if the evidence is noted.

(*d*) It was pointed out by Lord J. C. Moncreiff in *Nixon* v. *Caldwell*, June 1876, 3 R. (J. C.) 31; 3 Coup. 291, that in the case of a payment falling due periodically, where one of the termly payments which has fallen in arrear is decerned for in the Small Debt Court, the settlement of ultimate right may be decided in a competent Court. This remark in no way conflicts with the stringent provisions of the statute; for the declarator that may be sought is not that the pursuer of it ought not to have had to pay, or ought to have got decree for, the sum sued for in the Small Debt Court, but that other payments ought, or ought not—as the case may be—to be made.

(*e*) As already pointed out in note (*a*),—a distinction is to be drawn between the matter complained of is one for which the Sheriff could or should have

redress, and one in which he could not. In the former event the party's remedy is to apply to the Sheriff, and, if necessary and competent, thereafter to bring an appeal. Thus suspension or reduction or other remedy by the Court of Session was refused in the following cases. Where a party averred that he was not subject to the jurisdiction of the Sheriff of the county who granted the decree and that the summons had not been served on him, the Court refused to intervene,—*Graham* v. *Mackay*, 25 Feb. 1845, 7 D. 515; 17 J. 240. Where James Learmont, Fountainbridge, had been cited personally for a debt which bore to have been incurred by James Learmont, Clarence Street, it was held that, though it might be competent to suspend the proceedings under the poinding following on the decree obtained against him, the decree itself could not be got at,—*Learmont* v. *Darlington*, 28 Feb. 1849, 11 D. 884; 21 J. 308. Where a party sought to suspend diligence on a decree obtained in absence against him on the ground of payment made before decree, the Court were of opinion that his remedy was to have sisted the decree,—*Turnbull* v. *Russell*, 15 Nov. 1851, 14 D. 45; 24 J. 9. Where a Mrs Barbara Petrie or Spalding asked for interdict against the defender's selling certain articles belonging to her which had been pointed under a decree in absence in an action directed against Mrs Grace Spalding, the Court refused to interfere,—*Spalding* v. *Valentine*, 4 July 1883, 10 R. 1092; 20 S.L.R. 724. The service it may be pointed out was personal, the residence was correctly given, and the debt was admittedly due. In a case in which a party was personally cited, and the execution bore that the officer had cited "the within designed William M'Lean," and he allowed decree to pass in absence and did not aver he was not owing the money, the Court refused a suspension which he brought based on the ground that the "ean" of his name in the summons was written on an erasure,—*M'Lean* v. *Douglas*, 28 Jan. 1834, 12 S. 348; 6 J. 211.

So also claims for damages have been repelled where a party has omitted to protect himself by appearing before the Sheriff and stating his objections. Thus in *Bell* v. *Gunn*, 22 June 1859, 21 D. 1008; 31 J. 556, where a party, though personally cited and personally charged, claimed damages on the ground that the summons bore that the pursuer of it sued for self and other brothers,—that more was sued for than was due to such pursuers,—and that the brothers had not authorised the action, the Court dismissed the claim. And where a party claimed damages on the ground that a decree had been obtained in absence against him on 13th May, although, as matter of fact, he was cited to attend the Court on 13th March, the Court held that such claim was incompetent, seeing that he had not taken the course pointed out by the Small Debt Act,—*Crombie* v. *M'Ewan*, 17 Jan. 1861, 23 D. 333; 33 J. 167. A still later instance of the same principles is to be found in the instructive case of *Keene* v. *Aitken*, 15 Feb. 1875, 12 S.L.R. 308. In that case George Robert Keene, butler at Pinkie House, Musselburgh, sought for reparation on the ground that he had been served with a Small Debt Summons directed against Charles Kean, butler, Pinkie House, Musselburgh. He informed the officer of the mistake but kept the copy summons; and, allowing decree to pass in absence, was charged on the decree, and, not having paid the debt or sisted the decree, was incarcerated. He did not say he did not owe the money. Lord Craighill held he had no claim for reparation—"the error, such as it was, could lead to no misconception; and if it was to be made the ground of an objection, the pursuer ought to have appeared in Court either at

the original diet or at a diet for rehearing, which on application must have been granted. But he lay by, either indifferent to the consequences or willing to turn these to profit; and having acted thus, the law will not recognise as a ground for damages the incarceration which ensued." His Lordship also repelled the plea that the Sheriff officer had refused to accept payment of the debt. The judgment was acquiesced in.

But it may be different if some material error has occurred after the decree for which the Sheriff cannot now give redress. Thus in the case of Learmont, above quoted, it was indicated that if the poinding of Mrs Learmont's goods under the decree obtained against her son had been insisted in, the Court of Session could have suspended the diligence against her property. And on this ground damages were given in Lanarkshire in *Macleod* v. *Aitken & Macdonald*, 11 Feb. 1881, 25 J. of J. 387. In *Murchie* v. *Fairbairn*, 22 May 1863, 1 M. 800; 35 J. 493, reduction of an extract Small Debt decree was held competent on the allegation that it had been altered by the Sheriff Clerk several days after extract, so as to cover a larger sum than that decerned for by the Sheriff and which it originally bore. So also when warrant for execution after the elapse of ten free days, instead of ten days after a charge, was issued against an individual who had not been personally present at the hearing of the cause, though represented by an agent, the Court of Session suspended the charge,—*Shiell* v. *Mossman*, 7 Nov. 1871, 10 M. 58; 44 J. 46. Here it will be noticed that, as there was imprisonment, there was implement of the decree, and a sist was impossible,—see section XVI., note (*d*). The principle in question is also illustrated in the case of *Samuel* v. *Mackenzie & Bell*, 29 Nov. 1876, 4 R. 187; 14 S. L. R. 130. In that action the defenders had obtained decree in absence against Samuel for a debt, and arrested funds on the decree. Between the date of the decree and of the arrestment Samuel became bankrupt and obtained his discharge on a composition. In this way the proportion applicable to the debt came to be the amount payable in respect of it. Hence it was useless to sist the decree, because the decree was undeniably correct at the time it was granted.

(*f*) See note (*d*) and cases quoted. In *Smith* v. *M'Gavin*, 1 April 1864, 3 Scot. Law Mag. 68, it was held by Lord Ormidale, and acquiesced in, that a reduction was incompetent where a party averred he had not been cited to attend the Court on the day on which decree was taken against him, but who had not taken steps to sist the decree, though charged upon it. And in *Lennon* v. *Tully*, 12 July 1879, 6. R. 1253; 16 S. L. R. 740, it was held by the First Division that, where a party alleged that the summons in a Small Debt action had not been properly served on him, the only competent Court of appeal was the Court of Justiciary. On the other hand, a suspension was granted where a Sheriff Clerk signed a summons in which he himself sued for payment of an account in the Small Debt Court. The Lord Ordinary and Lord Benholme took a different view; but the other three Judges thought that owing to the radical defect in which the case originated, and having regard to the fact that all subsequent procedure in the case had to take place through the Sheriff Clerk, there was a constitutional illegality which gave the Court power to intervene,—*Smith* v. *Manson*, 8 Feb. 1871, 9 M. 492; 43 J. 261.

Form of review provided.

XXXI. And be it enacted, That it shall be competent to any person (*a*) conceiving himself aggrieved by any decree (*b*)

given by any Sheriff in any cause or prosecution raised under the authority of this Act (*c*), to bring the case by appeal before the next (*d*) Circuit Court of Justiciary, or, where there are no Circuit Courts (*e*), before the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions (*f*) contained in the before-recited Act, passed in the twentieth year of the reign of his Majesty King George the Second (*g*) for taking away and abolishing the heritable jurisdictions in Scotland, except in so far as altered by this Act (*h*): Provided always, that such appeal shall be competent only (*i*) when founded on the ground of corruption (*j*) or malice and oppression (*k*) on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done (*l*), or on incompetency, including defect of jurisdiction of the Sheriff (*m*); Provided also, that such appeals shall be heard and determined in open Court (*n*), and that it shall be competent to the Court to correct such deviation in point of form, or to remit the cause to the Sheriff with instructions or for rehearing generally (*o*), and it shall not be competent to produce or found upon any document as evidence on the merits of the original cause which was not produced to the Sheriff when the case is heard, and to which his signature or initials have not been then (*p*) affixed, which he is only to do if required, nor to found upon nor refer to the testimony of any witness not examined before the Sheriff (*q*), and whose name is not written by him when the case is heard upon the record copy of the summons, which he is to do when specially required to that effect: Provided further, that no sist or stay of the process and decree, and no certificate of appeal shall be issued by the Sheriff Clerk, except upon consignation of the whole sum, if any, decerned for by the decree and expenses, if any, and security (*r*) found for the whole expenses which may be incurred and found due under the appeal.

Appeal to Circuit or High Court.

Grounds of appeal.

Procedure.

What documents and evidence may be founded on.

Consignation and security required.

(*a*) Frequently an action is brought as a test case in the Small Debt Court; but though the party who brought it may be content to acquiesce in an ad-

verse decision, others having the same interest may not. It is thought that it would, however, be an unfair reading of the statute and contrary to Scotch practice if any one could take the case to appeal save one or other of the parties to it.

(*b*) Not a decree in absence which can be reheard under section XVI. Under section XV., if a party is not present or not represented, if the service is *ex facie* regular, decree must be given *causa non cognita*. But the grounds on which appeal is competent almost all imply that the decree appealed against must have been pronounced *in foro;* and it is not consistent with the policy of the statute to convert a Court of appeal into a Court of first instance. Unless therefore, through no fault of his own, a party decided against in absence is unable to get his cause reheard, it is plain from the cases of Graham, Turnbull, Spalding, Smith, Keene, and others cited in notes (*e*) and (*f*) to the preceding section, that his duty is to sist the decree. The ground of appeal is meant to be the fault or error of the Sheriff, and not the fault or error of the appellant himself.

(*c*) In *Campbell* v. *Gillies*, referred to in section XIV., note (*f*), it was held by Lord Ardmillan that when a case is remitted by the S. S. to his Ordinary roll, which allows it to be appealed to the Sheriff, the case is still appealable under the Small Debt Act to the Circuit Court. This decision would lead to anomalous results. The position of the law as to appeal is as follows: An action concluding for a sum not exceeding £12, brought in the Small Debt Court, is appealable only to the Justiciary Court under the provisions of this Act, unless decree has been granted for a sum between £8, 6s. 9d. and £12, and imprisonment has followed, in which case there is complete review on the merits of the case by the Sheriff, in the form of a summary petition for suspension and liberation under the provisions of the Sheriff Courts Act of 1853. If the action be in the Ordinary Court and the value of the cause do not exceed £25, the only appeal lies to the Sheriff. If the case be above the value of £12, to whatever extent, and be remitted for summary trial under the provisions of the Small Debt Act the only appeal is, under the limits provided by it, to the Justiciary Court.

But as pointed out by Lord J. C. Moncreiff in his instructive opinion in *Nixon* v. *Caldwell*, 1 June 1876, 3 R. (J. C.), 31; 3 Coup. 291, however small be the amount concluded for in the Ordinary Court, if the value of the cause exceeds or may exceed £25, the case is appealable to the Court of Session. Now, as has been pointed out under section II., note (*f*), a case which is of greater value than £12 may be brought in the Small Debt Court, provided the sum actually concluded for does not exceed £12. If, then, the view taken by Lord Ardmillan in *Campbell* v. *Gillies* be correct, it would follow that an action might be remitted from the Small Debt to the Ordinary Court, and then either appealed to the Sheriff, or to the Justiciary Court, or to the Court of Session. But no case has occurred in which it has been held there was an alternative Supreme Court to which appeal might competently be taken. The policy has been to hold a contrary view, and, with much deference to his Lordship's decision, it is thought that when a case is remitted to the Ordinary Court, it is subject to the regulations and endowed only with the privileges applicable to Ordinary Court cases. It might further be noticed that when the case is remitted to the Ordinary Court, the evidence is recorded and a written judgment given. But if the case were appealed under the provisions of the

Small Debt Act to the Circuit Court it would come up in an entirely different condition from that in which Small Debt cases come up for appeal.

(*d*) The next ordinary Circuit Court,—not the intercalary Circuits recently sanctioned, nor the Christmas Circuit Court in Glasgow,—*Davidson* v. *Gray*, 6 Jan. 1844, 2 Broun 9.

(*e*) The Lothians and Peebles have no Circuit Courts. It used frequently to be thought that the Appeal Court for cases from Orkney and Shetland was the High Court of Justiciary; but in *Walker* v. *Niven*, 15 Sept. 1870, 43 J. 18; 1 Coup. 466, it was held that such appeal was competently brought before the Circuit Court at Inverness.

(*f*) These provisions are,—"That it shall and may be lawful to and for any party or parties conceiving himself or themselves aggrieved by any interlocutor, decree, sentence, or judgment of the Sheriffs or Stewarts Court of any county, shire, or stewartry, or of the Courts of any royal burgh, or burgh of regality or barony, or of any Court of any baron or other heritor having such jurisdiction as is not hereby abrogated or taken away, . . . in matters civil where the subject-matter of the suit did not exceed in value the sum of £12 sterling, to complain and seek relief against the same by appeal to the next Circuit Court of the Circuit wherein such county, shire, or stewartry, royal burgh, or burgh of regality or barony, or such barony or estate shall lie, so as no such appeal be competent before a final decree, sentence, or judgment pronounced; and such appeal it shall be lawful for the party conceiving himself aggrieved to take and enter in open Court, at the time of pronouncing such decree, judgment, or sentence, or at any time thereafter, within ten days, by lodging the same in the hands of the Clerk of Court, and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the cause, and serving in like manner the Inferior Judge himself, in case the appeal shall contain any conclusion against him, by way of censure or reparation of damages for alleged wilful injustice, oppression, or other malversation; and such service shall be sufficient summons to oblige the respondents to attend and answer at the next Circuit Court which shall happen to be held fifteen days at least after such service; and thereupon the Judge or Judges at such Circuit Court shall and may proceed to cognosce, hear, and determine any such appeal or complaint, by the like rules of law and justice as the Court of Session, or Court of Justiciary respectively, may now cognosce and determine in suspensions of the interlocutors, decrees, sentences, or judgments of such inferior Courts; but the said Circuit Court shall proceed therein in a summary way, and in case they shall find the reasons of any such appeal not to be relevant, or not instructed, or shall determine against the party so complaining or appealing, the said Judge or Judges shall condemn the appellant or complainer in such costs as the Court shall think proper to be paid to the other party, not exceeding the real costs *bonâ fide* expended by such party; and the decree, sentence, or judgment of such Circuit Court, in any of the cases aforesaid, shall be final. . . . Provided always, that wherever such appeal shall be brought, such complainer, at the same time he enters his appeal as aforesaid, shall lodge in the hands of the Clerk of Court from which the appeal is taken, a bond with a sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded; and the Clerk of Court shall be answerable for the sufficiency of such cautioner." By

the A. S. 10 July 1839, sections 132 and 133, it is further provided that "the appeal may be taken in open Court at the time of pronouncing the judgment, or within ten days thereafter, by both lodging the appeal in the Clerk's hands and serving the other party or his procurator in the cause with a copy thereof; and both the lodging and service must take place not only within ten days after the date of the judgment, but also fifteen days at least before the diet of the Circuit Court. At the time of entering the appeal, or within the said ten days, the complainer must lodge in the hands of the Clerk a bond, with a sufficient cautioner, for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded; and if no bond has been lodged, the Clerk may give out the extract."

1. In construing these provisions it has been held that whether the appeal be taken in open Court or subsequently, there must be "some minute or writing containing the appellant's demands, and capable of being lodged with the Clerk of Court," and that the entry by the Clerk in the Minute-book of notice to appeal given verbally in open Court was insufficient,—*M'Millan* v. *Campbell*, 21 Jan. 1832, 10 S. 220; 4 J. 248; and *Anderson* v. *Jamieson*, 28 Oct. 1872, 45 J. 22; 2 Coup. 359.

2. The notice of appeal may be given either by the appellant or his agent,—*Wyllie* v. *Lawson*, 16 Sept. 1863, 36 J. 1; 4 Irv. 441.

3. As regards the time within which the appeal must be taken, it was held by Lord Jerviswoode, in a case in which the appeal was lodged more than ten days after the judgment complained of, and where the Court Books contained no entry that the appeal had been taken in open Court, although the appellant alleged he had so taken it, that the appeal was incompetent and must be dismissed,—*Aberdeen* v. *Walker*, 6 May 1870, 7 S. L. R. 476. The point came up in a case in which a party seeking to reduce a Small Debt decree alleged it had been obtained against him in absence under a defective citation, and that he had not become aware of the decree till after the ten days allowed for appeal had elapsed, Lord Deas, while concurring in holding the application to the Court of Session incompetent, and that the only appeal lay to the Court of Justiciary, remarked that if appeal had been taken to that Court, "and the only objection stated to it had been that the period of ten days had elapsed, the Court, if satisfied that the decree had not come to the knowledge of the defender within the ten days, so that substantial justice had not been done, might and no doubt would have given a remedy,"—*Lennon* v. *Tully*, 12 July 1879, 6 R. 1253; 16 S. L. R. 740.

4. Where fifteen days had not elapsed between the date of service of the appeal and the sitting of the Circuit Court, the appeal was held incompetent by Lord Cowan and was withdrawn,—*Leaburn* v. *Wilson*, 10 Sept. 1869, 7 S. L. R. 1. Where the appeal was served on the sixteenth day before the diet of the Circuit Court including in the computation both the day of service and the day on which the Court met, Lord J. C. Hope held the appeal competent,—*M'Ritchie* v. *Thomson*, 30 April 1847, Arkley, 270. Where fifteen days had not elapsed between the date of the service of the appeal and the sitting of the Circuit Court, the appeal was allowed to be withdrawn, "reserving to the appellant all right competent to him to prosecute the same before the next Circuit Court;" and, on its coming up, the ten days' abortive notice given for the first Circuit was held by Lord Cowan to subsist and be sufficient for the

next Circuit Court,—*Newland* v. *Stewart*, 3 May 1866, 5 Irv. 245; 10 J. of J. 135.

5. The duplicate of the appeal must also be served within the ten days,—*Allan* v. *Stewart*, 17 Sept. 1857, 2 Irv. 701.

6. The service need not be by an officer of Court or messenger of arms; but there must be some probative attestation of service by a notary, or before witnesses, unless, as in *Weatherstone* v. *Gourlay*, 13 April 1860, 3 Irv. 589, there be a written acknowledgment of service by the respondent's agent, which was held sufficient to bar any plea. Under the Citation Amendment Act of 1882,—45 & 46 Vict. cap. 77,—the appeal may be served by the appellant's agent. A mistake in the appeal in regard to the residence of the appellant was in Weatherstone's case held immaterial.

7. The appeal, when lodged, should be docqueted by the Clerk of Court—*e.g.*, Glasgow, 1 April 1884. Lodged, A. B.

8. It is not essential that the note of appeal should specify all or any of the reasons of the appeal,—*Orrock* v. *Landale*, 5 May 1844, 2 Broun 189.

9. If there be a certification to the High Court and consequently an extra amount of procedure and expense, the Court instead of modifying the amount of expenses, may order an account to be given in, and remit it for taxation to the auditor,—*Allison* v. *Balmain*, 25 Oct. 1882, 10 R. (J. C.) 12; 20 S. L. R. 24. If the Court remit to the Sheriff in regard to the cause, it may remit to him to dispose of and decern for the expenses of the appeal as well as of the cause,—*Glass* v. *Laughlin*, 10 Nov. 1876, 4 R. 108; 14 S. L. R. 64. But the cautioner will not be bound to implement the decree of the inferior Court,—*Snell* v. *Glasgow Gas Co.*, 22 May 1834, 12 S. 626; 6 J. 357.

10. It is usual for the Clerk of Court to certify on the appeal that caution has been found to his satisfaction; but it is not essential. If, however, it be alleged that caution has not been found, opportunity will be given to produce evidence that it has,—*Marshall* v. *Turner*, 26 April 1849, 1 J. Shaw, 222. But if a bond of caution be not lodged with the appeal, Lord Cowan held that the appeal must be dismissed,—*Keane* v. *Lang*, 3 May 1866, 5 Irv. 248.

11. In *Sinclair* v. *Rosa*, 25 April 1863, 35 J. 511; 4 Irv. 390, it was objected that there was no process, as neither the decree in the inferior Court nor a certified copy thereof had been lodged with the Justiciary Clerk; but Lords Neaves and Jerviswoode repelled the objection, holding that the decree was contained in the Sheriff Court Book, which was the best evidence of it that could be produced,—it was the only thing authenticated by the Sheriff.

(*g*) 20 Geo. II., cap. 43.

(*h*) The grounds of appeal are limited; the powers of the Court in dealing with the appeal are broadened; the documents and evidence that may be founded on are restricted; and though appeal be taken, no benefit can be taken under it unless the sum or sums decerned for be consigned.

(*i*) The appeal is limited by the statute to four grounds—(1) corruption, (2) malice and oppression, (3) deviations from the statutory forms which either took place wilfully or prevented substantial justice being done, and (4) incompetency, including defect of jurisdiction. It is obvious that none of these grounds of appeal apply to the merits of the cause, but rather to the merits or demerits of the Sheriff; and it is said to have been avowed in open Court by the Judge who drew this clause of the Act that it was his intention

to exclude all appeal on the merits of the cause. Consistently with this view, it has repeatedly been held that the Court cannot entertain any consideration of whether the views on the law or the facts taken by the Sheriff were well founded or not. But though this be admittedly the proper view to be entertained by the Court of its functions, it is difficult to say that it has always been acted on. Thus in *Sturrock* v. *Anton*, 20 April 1866, 5 Irv. 234, Lords Ardmillan and Neaves held "review on the merits is expressly excluded," and on that ground disapproved of the decision in *Glasgow & S. W. Ry. Co.* v. *Wilson*, 5 May 1855, 27 J. 368; 2 Irv. 162. But on the same day their Lordships in *Scot. N. E. Ry. Co.* v. *Matthews*, 5 Irv. 237, held that if the account annexed to a Small Debt Summons shows no sufficient ground in law for the action, the appeal ought to be sustained. It is thought, with much deference, that unless the error or misconduct of the Sheriff in sustaining such an action is so gross as to amount to corruption, or malice and oppression, appeal is not competent. If *a* ground of action is stated, there is no "deviation in point of form from the statutory enactments;" but if the ground is erroneous or insufficient, then it is an error in law that the Sheriff commits in sustaining it as correct or sufficient, and against such error there is no appeal, unless, as already said, it be so gross as to amount to corruption, or malice and oppression. Accordingly, in *Scot. N. E. Ry. Co.* v. *Cargill*, 13 Sept. 1866, 5 Irv. 298, Lord Jerviswoode at the next sitting of the Circuit took an opposite view; and in *Ferguson* v. *Mackie*, 6 Feb. 1878, 4 Coup. 5, the High Court held appeal incompetent against the judgment of a Sheriff in holding a case irrelevant. See also the cases of *Allison* and *Sinclair*, *ut supra*, note (*f*); and *Mosson* v. *Brash*, 27 Sept. 1872, 45 J. 5; 2 Coup. 325.

(*j*) Corruption may be regarded as implying an erroneous decision of the cause through undue bias of the Judge *towards* one of the parties. Hence if a Sheriff through bribery or undue partiality decided a case wrongly in favour of one party, the judgment could not stand. The term "corruption" is familiar as a ground of challenge of an arbiter's award; and the Articles of Regulations conjoin with it "bribery, or falsehood." In this way the word "corruption" has been frequently the subject of judicial exposition in reductions of decreets arbitral; but the definitions given, while they show the elasticity of meaning the word possesses, are more apposite to the next ground of appeal under the Small Debt Act. These decisions, however much they may differ in the shades of meaning they attach to the word "corruption," agree in this, that it does not, in the sense in which it is used, necessarily imply anything dishonourable or morally wrong, and that it does not mean a mere error in judgment. As Lord Mackenzie said in deciding the case of *Mitchell* v. *Cable*, 17 June 1848, 10 D. 1297; 20 J. 476,—"we are not entitled to set aside the award of an arbiter pronounced under an error of judgment, however palpable that error may be; but if any failure in duty has been committed distinct from error in judgment, the award cannot stand,—that failure must be included under the term 'corruption.'" In *Ledingham* v. *Elphinstone*, 16 Dec. 1859, 22 D. 245; 32 J. 102, Lord J. C. Inglis characterised "corruption" as "misconduct leading to injustice." See also *Miller* v. *Millar*, 10 March 1855, 17 D. 689; 27 J. 292. There is no report of any successful appeal on this ground against a Sheriff's judgment. And in *Flowerdew* v. *Reid*, 30 Sept. 1852, 25 J. 7; 1 Irv. 91, where a Sheriff had pronounced an interlocutor continuing a case in which he was himself a

party, it was held that this had not the effect of vitiating the whole proceedings, but only of nullifying that particular interlocutor.

(*k*) The phrase "malice and oppression" may be regarded as implying an erroneous decision of the cause through undue prejudice on the part of the judge *against* one of the parties. Hence it has repeatedly been held that if an arbiter or judge decides against a party without hearing him, where he ought to have heard him, the result cannot be maintained. In *Philip* v. *Forfar Building Investment Co. Trustees*, 16 Sept. 1868, 41 J. 1; 1 Coup. 87, it was remarked by Lord Deas that this part of the statute did not require "personal malice on the part of the Sheriff. What was done might be so grossly unjustifiable that the law would hold it equivalent to personal malice. . . . And it is very plain under the statute, that however erroneous the judgment might be, that would be no ground to entitle this Court to interfere, unless it could be shown that the Sheriff went wrong in respect of malice or oppression." In accordance with this view it has frequently been held that alleged erroneous decision or construction of a statute does not justify appeal,—see *Beattie* v. *Gemmell*, 4 Feb. 1862, 24 D. 431; 34 J. 213; and *Mosson* v. *Brash*, 27 Sept. 1872, 45 J. 5; 2 Coup. 325.

On the other hand, where a Sheriff had sustained an action against the trustee on a sequestrated estate instead of holding that the proper course was to lodge a claim with the trustee, the appeal was sustained,—*Donaldson* v. *White*, 8 Sept. 1871, 44 J. 1; 9 S. L. R. 65. This appeal appears to have been sustained on the ground of incompetency; but it is thought that it can be more fitly classed under the head of malice and oppression,—see the opinion of Lord J. C. Moncreiff in *Wilson* v. *Glasgow Tramway Co.*, 22 June 1878, 5 R. 981; 15 S. L. R. 656; though there is some difficulty in bringing it within the statutory grounds at all, and his Lordship had some difficulty in concurring with Lord Deas. But evidently both the learned judges felt strongly that some mode of extrication should be found from proceedings which Lord Deas characterised as "radically incompetent." Apparently on a like principle an appeal was sustained where a Sheriff had allowed evidence to be adduced to contradict the Valuation Roll,—*M'Lachlan* v. *Tennant*, 4 May 1871, 43 J. 390; 2 Coup. 45. And where a Sheriff had given decree without the defender's writ or oath, and without any admission of resting owing by him, although the debt had obviously undergone the triennial prescription, the judgment was recalled, and a remit made to him to proceed in accordance with the statute which had been disregarded,—*Murray* v. *Mackenzie*, 21 April 1869, 41 J. 394; 1 Coup. 247. The soundness of this decision, however, has been questioned,—see *infra*, note (*m*). In another case, a remit was made to the Sheriff to inquire into the procedure in the case,—*Gunn* v. *Taylor*, 20 Sept. 1873, 2 Coup. 491.

But where the Sheriff was said to have erroneously repelled a plea of prescription, appeal was held incompetent,—*Buchanan* v. *Glasgow Corporation Water Works Commissioners*, 19 Sept. 1862, 4 Irv. 225. And where a party averred that in the citation and decree he was designed Edward Atherton instead of Edward John Atherton, and that the Sheriff had acted maliciously and oppressively in not hearing him fully, the High Court held the reasons of appeal irrelevant to set aside the judgment complained of,—*Atherton* v. *Moffat*, 18 Feb. 1843, 1 Broun 524. Again, where a Sheriff, after the appellant had got a case several times continued and had obtained a commission

(which was not executed) to have his evidence taken, decided against him, although a medical certificate of his inability to be examined was produced, Lords Ardmillan and Neaves refused an appeal,—*Seton* v. *Warrington*, 26 Sept. 1868, 6 S. L. R. 56. And a similar judgment was pronounced by Lord J. C. Moncreiff and Lord Cowan in a case in which an appellant complained that the Sheriff had allowed parole proof to modify a written document,—*Hair* v. *Nicol's Trs.*, 4 May 1871, 43 J. 389 ; 2 Coup. 40.

(*l*) A perusal of the reports shows that attempts have been made to give the words of the statute a meaning they were not intended to bear and do not bear. It has been pointed out in note (*i*) that appeal against the judgment of the Sheriff on the matter of relevancy or on the merits is not competent. Therefore the deviation complained of must have to do with the procedure. It must in general be something that proves itself. If for example a Sheriff, in the ordinary class of case, gave a decree for more than £12, or entertained a counterclaim which had not been timeously served, or sustained a second sist by the same party, or called a sisted case out of its turn when the sister was absent, the aggrieved party would have a good appeal. But he must be, in the words of the incorporated statute, "aggrieved,"—he must be able to aver that there has been some miscarriage of justice ; and where the deviation has occurred inadvertently on the part of the Sheriff, he must show that it prevented *substantial* justice from being done. It must be kept in view that the party is an appellant and that he is addressing a Court of appeal. If, therefore, the error in the proceedings that he complains of could have been brought before the Sheriff and was not, or could have been rectified without appeal, the decisions show that the appeal is not likely to be successful,—see *Rennie* v. *N. B. Ry. Co.*, 20 April 1874, 1 R. (J. C.) 22, and notes (*e*) and (*f*) to the preceding section. If the objection was taken and waived in the Small Debt Court, the appeal would have even less foundation.

In general the appeal on this ground resolves itself into an attempt to get the Court to review the judgment of the Sheriff in regard to the sufficiency of the ground of action ; but the later cases show that on this matter the Circuit Courts consider themselves debarred from interfering by the finality provision of the statute. Accordingly, in *Birrell* v. *Taylor & Buchanan*, 4 May 1871, 43 J. 388, Lord J. C. Moncreiff and Lord Cowan dismissed an appeal in which it was complained that the summons did not disclose a title to sue, and that neither it nor the account contained sufficiently explicit statements of the ground of action. So also where a party objected to a decree in respect that while the summons bore to proceed against him as an individual, the tenor of the appended account showed that it was in reality due by a Society of which he was secretary, the appeal was dismissed,—*Sinclair* v. *Rosa*, 25 April 1863, 35 J. 511 ; 4 Irv. 390. See also *Newlands* v. *Stewart*, 3 May 1866, 5 Irv. 245 ; 10 J. of J. 135. A contrary view was taken in *Glasgow & S. W. Ry. Co.* v. *Wilson ;* but in *Sturrock* v. *Anton*, this decision was disapproved of,—see note (*i*). In *Mowat* v. *Martine*, 20 June 1856, 28 J. 521 ; 2 Irv. 435, the High Court held that where an action was brought for a slump sum for medical attendance "from 25th August 1854 to 1855" there was no real deviation which could mislead or create injustice. Again, appeal was refused by Lord J. C. Moncreiff and Lord Cowan, where it was alleged that the Sheriff had omitted to take a certain statute into consideration, or had construed it wrongly,—*Mosson* v. *Brash*, 27 Sept. 1872, 45 J. 5 ; 2 Coup. 325 ; by Lord

Craighill, where the Sheriff was said to have erroneously deducted certain disallowed items from the unrestricted and not from the restricted amount in question,—*Dalglish & Kerr* v. *Anderson*, 22 Feb. 1883, 20 S. L. R. 412; and by the High Court, where the appellant admitted having got all the items in a grocery account, and the Sheriff thereon gave decree without hearing witnesses or explanations, or excising the items falling within the provisions of the Tippling Act, which Act, however, had apparently not been pleaded,—*Nisbet* v. *Cameron*, 4 June 1873, 10 S. L. R. 458.

On the other hand Lord Neaves considered there had been a vital deviation from the statutory enactments, where a Sheriff ordained a defender to find caution, and in default of its being found decerned,—*Paterson* v. *Paterson's Trs.*, 25 April 1872, 44 J. 381; 2 Coup. 234. "I am satisfied," he said, "that it was quite incompetent for the S. S. to pronounce an order for caution in an action so strictly petitory in its nature as this is, and which, moreover, is regulated by a statute which contains no provision authorising such a proceeding." With much deference to the learned judge, it is thought this judgment deserves reconsideration. The action was one for damages for alleged illegal possession of a shop. Having regard to the familiar provisions as to such occupation it is thought the order was not inappropriate. It has frequently been pointed out that in the Small Debt Court the Sheriff exercises only his ordinary jurisdiction under certain provisions,—*Nixon* v. *Caldwell*, 1 June 1876, 3 R. (J. C.) 31; 3 Coup. 291; *Scott* v. *Lethem*, 22 May 1846, 5 Bell, App. 126; 18 J. 421; *Fraser* v. *Mackintosh*, 19 Dec. 1867, 6 M. 170; 40 J. 98; and a Court has always, it is thought, power to appoint caution to be found should circumstances render such a course proper. If the S. S. instead of pronouncing the order had continued the case for a week that caution might be found, and on ascertaining that it had not been found, had then decerned, it would have been difficult to question the judgment. But the result was the same. Section VIII. of the statute shows caution is not foreign to it; and in cases tried in the Small Debt Court under the Employers and Workmen Act, it is alike competent and necessary to order caution to be found. Apparently, therefore, the Legislature did not regard an order for caution as inconsistent with the machinery of the Small Debt Act.

(*m*) A good deal of difficulty has been felt by the Court of Appeal in ascertaining the proper meaning of these words. One thing, however, that is obvious is, that defect of jurisdiction is a branch or phase of incompetency; and it may be inferred that this implies that, though some other Sheriff or other Court might have had jurisdiction to try the cause, the Sheriff whose judgment is under appeal had not. This consideration favours the view that what the Legislature intended by incompetency was incompetency of the judge to try the question, and not incompetency of the pursuer to make the claim. The incompetency in short, it is thought, attaches to the Sheriff and not to the validity of the claim; and the Sheriff is competent to judge of the alleged incompetency of the claim. The decree may be the sound decision of the claim, but if it was incompetent for the Sheriff to pronounce it, the judgment cannot stand. In this view appeal would fall to be sustained, it is thought, on the ground of "incompetency, including defect of jurisdiction of the Sheriff," if he entertained a plea which could competently be tried by him only in another Court, or by another Sheriff, or by a higher Court. Hence if he decerned for a larger sum than £12, or against a party not

subject to his jurisdiction, or in a question of status,—these, it is thought, would be examples of judgments which the statute does not exclude from appeal. But if the incompetency in issue be the incompetency of the claim that is made, *quâ* claim, then, be the Sheriff's judgment right or wrong, as the plea is not to the competency of the judge to try the claim but to the soundness of the legal principle on which the claim is based, the judgment, it is thought, cannot be touched on the ground of incompetency, but only, as above pointed out, on the ground of corruption or malice and oppression, if the error be so gross as to justify such a view. If, therefore, a defender plead that the claim made against him is incompetent in respect of some agreement, or of some disqualification of the pursuer, or of some state of matters which is thought to justify the ordinary plea of "the *action* is incompetent,"—the Sheriff is competent to judge of the plea, and the Court of appeal is incompetent to consider whether his judgment was sound or not.

These views to some extent conflict with one or two of the judgments pronounced in the earlier years of the statute; but, it is thought, they receive authoritative countenance in later decisions, especially in the luminous expositions of the statute given on various occasions by Lord J. C. Moncreiff. Thus in deciding *Wilson* v. *Glasgow Tramways Co.*, 22 June 1878, 5 R. 981; 15 S. L. R. 656, his Lordship remarked: "If the plea taken be one not properly to the competency of the judge, but one which simply excludes the party from invoking his jurisdiction, such as *res judicata, lis alibi pendens*, prescription, discharge, title to exclude, and the like, it is not an objection to the jurisdiction, but a plea personal to the party of which the Sheriff must judge; and whether he decide rightly or not, his judgment in the Small Debt Court is final, whether sound or unsound. It is the law of that case." The judgment of Lord Gifford in the same action and the views expressed by him in regard to incompetency, and which are stated at some length, may be referred to. *Inter alia*, he remarked, "incompetency in the strict technical meaning of the word signifies that the judge has no power to deal with the matter either way,—that he cannot decide it at all either in favour of the pursuer or of the defender,—he cannot look at it at all or come to any conclusion regarding it." See also *Nixon* v. *Caldwell*, 1 June 1876, 3 R. (J. C.) 31; 3 Coup. 291.

In *Murray* v. *Mackenzie*, 21 April 1869, 41 J. 394; 1 Coup. 247, an appeal was sustained on the ground of incompetency, where the account sued on had *ex facie* undergone the triennial prescription, and where the respondent in the appeal, while alleging that prescription had not been pleaded, admitted that there had been no writ produced,—that the defender's oath had not been taken,—and that he had objected to certain parts of the account. Their Lordships had much difficulty in intervening, seeing that the appeal was practically on the merits; and the soundness of their decision has been questioned,—see an Article by Professor Mackay in 13 J. of J. 433,—and to some extent conflicts with the views expressed by Lord J. C. Inglis in *Beattie* v. *Gemmell*, 4 Feb. 1862, 24 D. 431; 34 J. 213. In a recent case the High Court held appeal incompetent where it was objected that the pursuer had not convened the proper representative of a trades-union, and that the rules of the Association provided for a different means of settling disputes, and that the illegality of the objects of the Association excluded it from a Court of law,—*Allison* v. *Balmain*, 25 Oct. 1882, 10 R. (J. C.) 12; 20 S. L. R.

24. But Lords Young and Adam sustained an appeal where a Sheriff had, in a multiplepoinding of a husband's funds, preferred his wife, who for twenty years had been living apart from him, to the fund *in medio quâ* aliment,—*Strang* v. *Strang*, see note (*c*), No. 24, p. 28. Appeal has been sustained on the ground of incompetency where a Sheriff held that a party who was sued for payment of poor-rates could adduce evidence to contradict the Valuation Roll,—*M'Lachlan* v. *Tennant*, 4 May 1871, 43 J. 390; 2 Coup. 45; and also where a Sheriff sustained an action in which a collector of poor-rates sued the trustee on a sequestrated estate instead of claiming in the sequestration,—*Donaldson* v. *White*, 8 Sept. 1871, 44 J. 1; 9 S. L. R. 65. But, as has already been pointed out (note (*k*) *supra*), it is thought that these cases could perhaps be more fitly classed under the head of malice and oppression.

Defect of jurisdiction may occur either where the Sheriff has exercised a jurisdiction which he does not possess, or where he has declined to exercise a jurisdiction that he does possess, though to some extent this latter phase more or less approximates to one or other of the first two grounds of appeal,—see *Wilson* v. *Glasgow Tramways Co.*, *Nixon* v. *Caldwell*, *Allison* v. *Balmain*, &c., above quoted. In *Scott* v. *Anderson*, 3 July 1832, 10 S. 760, where a Sheriff had decerned against a party not legally subject to his jurisdiction, appeal was sustained. And it has been decided by the House of Lords that the want of jurisdiction in a Court cannot be cured or the objection barred by the objector having appeared and pleaded,—*Harvey* v. *Forrest*, 25 April 1845, 4 Bell App. 197; 17 J. 328.

It has already been pointed out in accordance with this view, that where the appeal is on the ground of defective jurisdiction, it is not necessary to show that the decision of the Sheriff on the claim is or may have been wrong; if he had no right to pronounce judgment at all, the judgment, whatever it be, cannot be sustained. And though the view taken by the Sheriff, after his jurisdiction is sustained by him, cannot be brought under review, the grounds on which he sustained his jurisdiction are open to argument at every point,—*Beattie* v. *Gemmell*, 4 Feb. 1862, 24 D. 431; 34 J. 213. An appeal was accordingly sustained by Lords Ardmillan and Neaves on the ground of defect of jurisdiction where part of a yard was in one county and part in another, and the Sheriff decided that the matter in dispute should be held within his jurisdiction. Their Lordships thought that though the point was narrow the case rather fell to be dealt with in the adjoining county, and sustained the appeal,—*Dempsie & Ayr* v. *Connell*, 26 April 1873, 45 J. 507; 2 Coup. 458. But an appeal was dismissed by Lord J. C. Moncreiff and Lord Cowan, where the appellant complained that the Sheriff had held an inspector of poor liable for various payments in respect of a certain woman, although the roll of paupers was produced to show she was not on it,—*Paterson* v. *Mackay*, 27 Sept. 1872, 45 J. 5; 2 Coup. 327. And it will not do to say, when a Sheriff holds a case irrelevant and dismisses it without hearing evidence, that he has refused to exercise his jurisdiction. Against such a decision the High Court held there is no competent appeal,—*Ferguson* v. *Mackie*, 6 Feb. 1878, 4 Coup. 5.

(*n*) But if the Court shall "find any such difficulty to arise, that by means thereof such Circuit Court cannot proceed to the determination of the same consistently with justice and the nature of the case, in any such case and not otherwise, it shall and may be lawful to and for such Circuit Court to certify

such appeal, together with the reasons of such difficulty, and the proceedings thereupon had before such Circuit Court, to the Court of Session or Court of Justiciary respectively, which Courts are hereby respectively authorised and required to proceed in and determine the same,"—20 Geo. II. cap. 43, sec. 37. In construing this provision, it has been held that when a case has been certified to the High Court, it may, if of opinion that the case would be more suitably dealt with, remit the case to one of the Divisions of the Court of Session,—*Burrell & Son* v. *Foster*, 2 Nov. 1868, 1 Coup. 103.

(*o*) Where the parties differ as to what occurred before the Sheriff, or the Court desires to ascertain the *rationes decidendi*, a remit is sometimes made for information,—*Gunn* v. *Taylor*, 20 Sept. 1873, 2 Coup. 491. The Court may also remit a cause to the Sheriff to proceed with, and with power to him to decern for the expenses of the appeal,—*Glass* v. *Laughlin*, 10 Nov. 1876, 4 R. 108; 14 S. L. R. 64.

(*p*) Strictly speaking, this provision would either require the Sheriff in hearing every case to mark the documents and the witnesses' names in case of appeal being taken, or preclude the appellant from founding on such documents or evidence if his appeal was not taken in open Court. But as the statute allows him to take his appeal within ten days, it is reasonable to hold the requirements of the Act satisfied if the Sheriff is asked to mark the documents and the witnesses' names within the ten days. If there are many documents the most convenient way is for an inventory to be made which the Sheriff will sign or initial.

(*q*) Unless the witness was examined on commission under section XIII. If the ground of appeal be that the Sheriff refused evidence, it will be unnecessary to have the names of the refused witnesses noted; for if it be a good ground of appeal the case will be sent back to let them be examined.

(*r*) Under the incorporated provisions of the 36th section of the Act 20 Geo. II. cap. 43, the Clerk of Court is responsible for the sufficiency of such security; but he can, if necessary, protect himself by requiring the sufficiency of the cautioner to be certified by a Justice of Peace.

Fees to be taken.

XXXII. And be it enacted, That the following and no other or higher fees or dues of consignation shall be allowed to be taken for any matters done in any cause or prosecution raised under the authority of this Act:—

Clerk's Fees in Causes under this Act.

Summons, including precept of arrestment, one shilling:
Each copy for service, sixpence:
Entering in Procedure Book, sixpence (*a*):
Renewed warrant to arrest on dependence, and entering in Book, one shilling:
Certificate loosing arrestment, one shilling:

Bond of caution, one shilling and sixpence:
Second diligence for compelling witnesses or havers to attend, one shilling:
Decree, including extract, if demanded, one shilling:
Hearing after decree in absence, one shilling and sixpence:
Indorsation of decree or warrant, and entering in book, one shilling:
Receiving report of sequestration and appraisement, and entering in book, one shilling:
Receiving report of sale under sequestration, and entering, one shilling:
Receiving report of poinding and sale, and entering, one shilling and sixpence.

Officer's Fees, including Assistants (b).

Citation of a party or intimation of counter-claim, and execution of citation given personally, one shilling:
Ditto, ditto, if citation not given personally, sixpence (*c*):
Citation of a witness or haver, sixpence (*d*):
Charging on decree, and returning execution of charge, one shilling:
Arrestment, and returning execution thereof, sixpence:
Intimation of loosing arrestment, and execution thereof, sixpence:
Poinding or sequestration and inventory, two shillings and sixpence:
Sale and report, two shillings and sixpence:
Officer's travelling expenses, for each complete mile from the Cross or Tron or other usual place of measurement in the town or place where the Court is held, where there is any such, or if there be none such, then from the Court House of such town or place to the place of execution or service, the distance travelled in returning after execution of the duty not to be reckoned, sixpence (*e*):
Assistants, each per mile, in the same manner, fourpence (*f*).

Crier's Fee.

For calling each cause, one penny, payable when summons is issued (*g*).

(*a*) Each time the case comes up on an adjournment or a sist, under sections XV., XXVII., and XVI., it has to be entered in the Procedure Book. It is not practicable to continue to use the first entry under the provisions of the Small Debt Act: and accordingly, under the Debts Recovery Act, which is a modification of the Small Debt Act, the provisions are different. A fee will therefore be payable at each continued diet by the pursuer of the action or pursuer of the sist, and included in the ultimate adjudication of the expenses.

(*b*) It is convenient that these should be noted by the officer on the summons before returning it to the Clerk of Court.

(*c*) By the Citation Amendment Act of 1882,—45 and 46 Vict. cap. 77,—which authorises the citation of parties and witnesses by registered letter, it is provided that where the claim does not exceed £5, the fee for citation shall be 1s.; and where it does, 1s. 6d. In addition to this there is the Post Office charge for registration and postage of the letter. The Act also provides that "where there are more parties than one cited in the same cause and only one execution is necessary, the above-mentioned fees respectively shall be allowed for the first party only, and two-thirds thereof for every other." The Act does not prohibit citation according to the previously existing law and practice, but it provides that "no higher fees shall be allowed on taxation than those contained in the Schedule hereto, unless the judge or magistrate deciding the case shall be of opinion that it was not expedient in the interests of justice that such service should be made in the manner" provided by the Act. See also section III., note (*j*).

(*d*) See note (*c*). The fee now for citing one witness is 1s., and every witness thereafter for the same diet 8d., together with the cost of postage of the letter citing him.

(*e*) Where the citation is by registered letter there will be no room for charges for the officer's travelling expenses. But where service is made in the old form, the travelling expenses of the officer and his assistants are further regulated by 1 & 2 Vict. cap. 119, sec. 10, which provides that "the travelling expenses of officers and their assistants . . . shall not be allowed for more than the distance from the residence of the officer employed to the place of execution or service, in case such distance shall be less than from the Court-house to such place, and the Sheriff shall have power to modify such expenses in case the officer residing nearest to the place of execution or service shall not be employed; and provided also that such travelling expenses shall not be allowed against an opposite party for a greater distance than twelve miles."

(*f*) See preceding note.

(*g*) It on the whole appears the reasonable construction of this provision that for each time the cause is called on the adjournment or the sist provided by sections XV., XXVII., and XVI., the crier's fee should be repeated like the third fee in the list of those payable to the Clerk of Court. The pursuer, or party sisting, will pay it at the time; and it will be dealt with ultimately like the other expenses of the cause.

Table of fees to be printed on summonses and hung up.

XXXIII. And be it enacted, That an exact copy of the immediately preceding section of this Act shall be printed on each summons or complaint (*a*), and on each service copy thereof, and shall also be at all times hung up in every Sheriff Clerk's office, and in every Sheriff Court place during the holding of any Sheriff's Small Debt Court; and any Sheriff Clerk from whose office any summons or service copy thereof shall be issued not having such copy of the said section printed thereon, or at any time omitting to have such copy hung up in his office or in the Sheriff Court place as aforesaid, or not causing the roll of causes each Court day to be publicly exhibited (*b*), or not causing the number and names of the parties in such roll to be called in their order as aforesaid, except with leave of the Sheriff upon cause shown in open Court (*c*), shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person who shall prosecute for the same, and to be disposed of as the Sheriff shall direct.

Roll to be exhibited and called in order.

(*a*) Generally on the back.

(*b*) In terms of section XVII.

(*c*) As pointed out in note (*d*) to section XVII., there is advantage in this requirement to call the numbers of the cases. It prevents risk of mistake or oversight by any person, and also lets him know whether the case in which he is is on or is likely soon to be on. But occasionally for the sake of an infirm witness, or a doctor, or other person whose detention in Court might be of serious injury, or where one case is contingent on another, or is of a character unsuited to disposal before the other litigants and witnesses, or for some such reason, verbally specified, the Sheriff may think fit to direct the case to be called out of its turn. If it is to be taken later, it ought to be called in its turn and the parties in it told when it will be taken.

Sheriff Officers' duties.

XXXIV. And be it enacted, That in all or any of the cases above mentioned, where any decree or warrant shall have been indorsed as aforesaid (*a*), the Sheriff's officer of the county where such decree or warrant has been originally issued, as well as of any county wherein the same is indorsed, are hereby authorised and required to obey and enforce such decree or warrant within such other county; and any Sheriff's officer failing to report any sequestration or poinding and sale as above directed (*b*), or violating or neglecting any other duty intrusted to him under this Act,

Penalty for neglect.

or wilfully acting contrary to any provision thereof, shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person aggrieved thereby, and to be disposed of as the Sheriff shall direct, reserving always all further claim of damages otherwise competent against any such officer (*c*), and without prejudice to the Sheriff's lawful authority to remove and punish all officers of his Court for misbehaviour or malversation in office.

(*a*) Sections VI., IX., X., XII., and XIX.
(*b*) Section XX. and note (*f*) thereto. See also section V., note (*i*).
(*c*) And his cautioners for loss or injury caused by his error or neglect to the pursuer, defender, or any other person directly. See also section V., note (*i*), and section XX., note (*f*).

Privileged persons not exempt.

XXXV. And be it enacted, That no person whatsoever shall be exempt from the jurisdiction of the Sheriff in any cause or prosecution raised under the authority of this Act on account of privilege, as being a member of the College of Justice (*a*), or otherwise.

(*a*) The College of Justice is defined by A.S. 23 Feb. 1687, to include the Judges, Bar, Writers to the Signet, Clerks of Court, Macers, Keepers of Court-Books and divers other officials and their clerks, and was still further extended by 1 & 2 Geo. IV. cap. 38. Its members were entitled to sue in the Court of Session cases for which otherwise it was not the competent forum. If in such cases they were called as defenders in the inferior Courts, they were entitled to plead their privilege and decline the jurisdiction,—*Jamieson*, Petitioner, 21 Feb. 1815, F.C. This privilege was abolished, so far as defence was concerned, as regards Small Debt causes, by the above clause, and as regards all causes by 16 & 17 Vict. cap. 80, sec. 48; while 13 & 14 Vict. cap. 36, sec. 17, took away any privilege where the pursuer or appellant was a member of the College of Justice.

Courts may limit fees in causes not exceeding £12.

XXXVI. And be it enacted, That in all causes and prosecutions wherein the debt, demand, or penalty shall not exceed the value of twelve (*a*) pounds sterling, exclusive of expenses and fees of extract, which shall in future be brought or carried on before any Court not according to the summary form herein provided, it shall be lawful for the judge in such Court notwithstanding to allow no other or higher fees or expenses to be taken or paid than those above mentioned (*b*).

(*a*) Extended from £8, 6s. 8d. See section II., note (*g*).
(*b*) See section IV., notes (*f*) and (*g*), and section XXXII., and notes (*c*) and (*e*) thereto.

Meaning of words in this Act.

XXXVII. And be it enacted, That in all cases in this Act, or in the Schedules hereto annexed, the word "Sheriff" (*a*) shall be held to include Sheriff Depute and Steward Depute, and Sheriff Substitute and Steward Substitute; the words "Sheriff Substitute" to include Steward Substitute; the words "Sheriff Court" to include and apply to the Court of the Sheriff or Steward or their Substitutes; the words "Sheriff Clerk" to include Steward Clerk and Depute Sheriff Clerk and Depute Steward Clerk; the words "shire" or "county" to include stewartry; the word "sheriffdom" to include and be included in the words shire, county, or stewartry; the word "person" to extend to a partnership, body politic, corporate, or collegiate, as well as an individual; the word "landlord" (*b*) to include any person having a right to exact rent, whether as owner, liferenter, heritable creditor in possession, principal tenant, or otherwise; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things, and every word importing the masculine gender only shall extend and be applied to a female as well as a male: Provided always, that those words and expressions occurring in this clause to which more than one meaning is attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

(*a*) See section II., note (*a*).
(*b*) See section V., note (*b*).

SCHEDULE (A.)

1. *Summons or Complaint in a Civil Cause.*

A. B., Sheriff of the Shire of to Officers of Court, jointly and severally.

Whereas it is humbly complained to me by *C. D.* [*design him*] (*a*), that *E. F.* [*design him*] (*a*), defender, is owing the complainer the sum of [*here insert the origin of debt or ground of action* (*b*), *and whenever possible the date of the cause of action or last date in the account*], which the said defender refuses or delays to pay; and therefore the said defender ought to be decerned and ordained to make payment to the complainer, with expenses: Herefore it is my will, that on sight hereof ye lawfully summon the said defender (*c*) to compear before me or my Substitute in the Court House at upon the (*d*) day of at of the clock, to answer at the complainer's instance in the said matter, with certification, in case of failure, of being held as confessed; requiring you also to deliver to the defender a copy of any account (*e*) pursued for, and that ye cite witnesses and havers (*f*) for both parties to compear at the said place and date, to give evidence in the said matter; and in the meantime that ye arrest (*g*) in security the goods, effects, debts, and sums of money belonging to the defender as accords of law. Given under the hand of the Clerk of Court (*h*) at the day of

J. P., Sheriff Clerk.

(*a*) *E.g.*, Robert Johnston, tailor, 36 Constitution Street, Glasgow. For further information as to the designation of parties, see §§ 24 and 25, pp. 9 to 12.

(*b*) *E.g.*, being the price of an overcoat supplied to the defender on his order on 26th July 1881. In regard to the statutory requisites as to the ground of action see §§ 28 to 30, p. 13; section III., note (*c*); and section XXXI., note (*l*). The following are some examples of grounds of action. These may be set forth either on the summons, as in some of the examples here given, or on an annexed paper,—see section III., note (*c*).

1. *For payment of an Account.*

. . . . the sum of five pounds, conform to account [or statement] hereto annexed dated 29th April 1882, which the said defender refuses, &c., *ut supra*.

Account referred to.

4th January 1882.	To 2 loaves	£0	0 9
6th " "	" 1 loaf	0	0 4½
	[*and so on.*]		
29th April "	" 3 loaves and 4 rolls	0	1 3½
		£5	0 0

2. *For an Accounting.*

4th July 1883. To amount due by the defender in respect of a joint adventure entered into by him with the pursuer in the beginning of March last for the sale of a large quantity of old barrels which the defender bought for their joint behoof at the price of £20.

By said price	£20	0 0
By cost of carriage to store	0	12 0
By store rent	0	10 0
	£21	2 0
To sums received for said barrels	32	0 0
To balance	10	18 0
Less sum agreed to be paid to pursuer as wages	0	18 0
Net profit	10	0 0
To one half thereof £5 0 0		
To wages as aforesaid 0 18 0		
To amount due to pursuer	£5	18 0

3. *For Aliment to parent.* (See section II., note (*c*), 4.)

16th February 1882. To aliment at the rate of 3s. 6d. per week for 52 weeks from said date, payable weekly and in advance, in respect that the pursuer is unable, from age and infirmity, to support himself, and that the defender is his son and able to spare the sum asked . . . £9 2 0

4. *For contents of Bill.*

. . . . the sum of eight pounds, per their acceptance of a bill for said amount, drawn by James Wilson, clothier, Elm Street, Glasgow, on them on 16th January 1884, at one month, and thereafter indorsed to the pursuer, who is holder thereof, and which they refuse to pay . . . £8 0 0

5. *For payment of Bill, &c.*

4th May 1883. To amount of bill, dated 1st February 1883, at two months, drawn by the pursuer on the defenders and accepted by them, but which they failed to retire at maturity, and which the pursuer had accordingly himself to retire

	£5	0 0
To interest to date	0	0 5
To noting protest	0	2 6
	£5	2 11

6. *For Brokerage.*

15th February 1882. To brokerage on freight of cargo per s.s. Albert from Glasgow to Gibraltar under charter-party dated 15th February 1882, said freight being 600 tons coals @ 10s. per ton, and amounting to . . £300 0 0

Brokerage,—⅓ of 5% on same 5 0 0

7. *For Damages for wrongous Apprehension.*

15th January 1884. To solatium and damages due to the pursuer by the defender in respect that on or about this date he, maliciously, and without probable cause, caused the pursuer to be apprehended on the charge of having stolen a silver watch from him £10 0 0

8. *For Damages for Breach of promise of marriage.*

14th June 1882. To reparation due by the defender, in respect that he, having gained the affections of the pursuer, they, on or about 3d March 1880, agreed to marry one another, which agreement he now refuses to implement, whereby she has suffered in her feelings and health and prospects, and has sustained loss through outlays made with a view to the marriage

£50, restricted to £12 0 0

9. *For Damages for Loss of Goods in Carriage.*

13th August 1883. To loss sustained by the pursuer, being the value of a barrel of apples which he gave to the defenders at their Central Station at Hamilton on 31st July last to deliver to him at his house, 47 Queen Street, Partick, but which they have failed or refused to deliver . . £2 3 4

10. *For Damages by Collision.*

18th May 1882. To loss and damage sustained by the pursuer through the fault of a servant of the defenders, supposed to be of the name of John Hill, who, on said date, negligently brought a cart, which belonged to the defenders, and was then under his charge as their servant, into violent contact with the pursuer's brougham in Gordon Street, Glasgow, whereby the said brougham was so much injured that it had to be repaired at a cost of £4 10 0

And the pursuer had to hire another for four days at a cost of 10s. per day 2 0 0

£6 10 0

11. *For Damages for Breach of Contract.*

6th March 1884. To loss and damages sustained by the pursuer, and for which the defender is responsible, in respect that on or about 13th February last he undertook to deliver to the pursuer, within three weeks thereafter, five hundred tons best Dalry jewel coal at the price of 11s. 9d. per ton, but which he has wholly failed to deliver, in consequence whereof the pursuer had, of this date, to purchase said coals at the market price of 12s. 3d. per ton, delivered to him, and has thereby incurred a loss of £12, 10s., restricted to £12 0 0

12. *For Damages for Dismissal of Servant.*

15th August 1883. To loss sustained by the pursuer in respect that she, having been engaged by defender's wife to act as cook in his service on a monthly engagement, commencing on 15th May last, and at the rate of thirty shillings per month, was on or about 8th July dismissed by his said wife without due notice, and is therefore entitled to the following sums :—

To wages for week ending 15 July	£0 7 6
To one month's wages in lieu of notice . . .	1 10 0
To board from 9 July to 15 August at 1s. per day . .	1 18 0
	£3 15 6

13. *For Damages by Bite of Dog.*

18th January 1882. To compensation for loss, injury, and damage sustained by the pursuer through having been bitten on the hand, on or about 20th October 1881, on the public road from Glasgow to Belmont, by a black retriever dog belonging to the defender, and previously known by him to be of a vicious disposition, through which bite the pursuer suffered much pain and alarm, and was incapacitated for work for some days, and incurred expense for medical treatment £12 0 0

14. *For Damages by Game* (see section II., note (*c*), 7).

15th November 1882. To damage done to the crops of the pursuer on the farm of Blairbeth, in the parish of Cadder and county of Lanark, of which he is tenant under the defender, during the year ending Whitsunday 1882 by the game, other than ground game, to which the defender reserved or retained the sole right, in excess of ten pounds, the amount of annual damage for which it was agreed no compensation should be due, and of which claim he gave notice in writing to the defender on 27th July 1882 . £40 0 0

15. *For Damages for Breach of Hypothec.*

20th May 1884. To loss sustained by the pursuer in respect that James Smith, shoemaker, being tenant under him for the half-year ending at Whitsunday last of the house and shop, No. 48 Content Street, Hillhead, and the rent therefor, amounting to £10, being unpaid, the defender, on or about 1st May 1884, wrongfully carried off, in breach of the pursuer's hypothec over the furnishing of said house and shop, a table, sofa, 4 chairs, clock, 2 carpets, and various articles of crockery, and is thus liable to him in payment of the said sum of £10, or, at least, of £5 as being the value of said furnishings so carried off and which he refuses to restore . . £10 0 0

16. *For Damages for Neglect of Work.*

1st December 1883. To loss, injury, and damage sustained by the pursuer in respect that the defender, having by Minute of Agreement, dated 1st June 1883, agreed and bound himself to serve the pursuer faithfully and diligently, as a turner, for eight and a half hours each day, for the period of six months from said 1st June, has nevertheless illegally and without just cause absented himself from his work continuously since 18th October 1883, although there was sufficient work supplied for him, and has by such absence prevented the pursuer from duly fulfilling orders intrusted to him, and from being able to keep his men fully at work, and has thus caused the pursuer to suffer loss to the extent of £30, restricted to . . . £12 0 0

17. *For Damages for Slander.*

26th September 1882. To reparation due by the defender, in respect that on or about said date, and in or near the shop, No. 21 Dairy Street, Glasgow, occupied by Hugh Jamieson, grocer, and in the hearing of the said Hugh Jamieson, and of his wife, and of Malcolm Mure, carter, residing at No. 87 Corunna Street, and others, he, falsely and calumniously, stated that the pursuer was a swindler and a liar, whereby the pursuer has suffered much in his feelings, and his business has been injured . . . £5 0 0

18. *For Delivery of borrowed Article.*

1st April 1884. To value of an umbrella belonging to the pursuer which defender borrowed on said date, and refuses or neglects to return £0 10 0

19. *For Delivery of abstracted Goods.*

15th January 1884. To value of an oak hat-stand, belonging to the sequestrated estates of William Turner, cabinetmaker, 41 Wilson Street, Glasgow, on which pursuer is trustee, and which hat-stand the defender removed from said premises on or about the date foresaid . . . £3 10 0

20. *For Inlying Expenses and Aliment* (see section II., note (*c*), 3).

18th May 1882. To defender's proportion of inlying expenses connected with the birth of an illegitimate female child of which the pursuer was delivered on said date, and of which defender is the father, in consequence of sexual intercourse which took place between the parties on 9th, 15th, 23d, and 27th August 1881, and on various other occasions in September following, in the pursuer's house at 24 Millfield Lane, Maryhill . . £2 0 0

To his proportion of aliment for said child till its death on 17th November 1882, at the rate of £8 per annum . . . 4 0 0

To his proportion of the cost of burying said child . . 0 16 0

£6 16 0

21. *For Payment as per Pass-Book.*

. . . the sum of five pounds for goods, as per pass-book, in the defender's possession, ending on or about 14th March 1882, which, &c.

22. *For Payment of Promissory Note.*

. . . the sum of four pounds, per promissory note granted by him to the pursuer on 26th April 1884, which &c.

23. *For Payment as per Statement.*

11th Dec. 1883.	To rent of hall for soiree as agreed on .	£2 0 0
18th Dec.	To rent as above, and of one side-room .	2 4 0
	To repairing three forms broken by defenders	0 5 6
		£4 9 6

24. *For Rent.*

15th May 1882. To half-year's rent due by the defender at this date, as tenant of the house, No. 48 Thomson Street, Maryhill, under a verbal lease thereof for one year from Whitsunday 1881, granted to him by the pursuer on or about 22d March 1881 . . . . . £10 0 0

25. *For Sum due on account of Vitious Intromissions.*

5th February 1884. To sum due to the pursuer by the defender in respect that the now deceased Thomas Good, tailor, 32 Tay Road, Glasgow, being indebted to him in the sum of £8, conform to bill at 3 months, granted to him by the said Thomas Good for said sum on 29th October 1883, and the said Thomas Good having died on 13th January last, the defender has taken possession of and realised the goods and effects, or part thereof, of the said Thomas Good, without having any title at law so to do, whereby the pursuer will be defeated of payment of the sum due to him as aforesaid . . £8 0 0

(*c*) As to the citation of the defender see section III., note (*j*).

(*d*) As to the induciæ of citation see section III.

(*e*) As to the necessity of this see section III., note (*h*).

(*f*) See section XII. and notes.

(*g*) See section VI. and notes.

(*h*) As to the issuing of summonses by a Depute Sheriff Clerk, or *pro hac vice* representative of the Sheriff Clerk, see section XXV. and notes.

2. *Citation for Defender* (*a*.)

E. F., defender, above designed, you are hereby summoned to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification set forth in the above copy of the summons or complaint against you.

This notice (*b*), served upon the day of by me (*c*),

J. T., Sheriff Officer.

(*a*) See section III., notes (*h*) and (*j*), and section XXX., note (*f*).

(*b*) It is necessary for the officer to serve a copy of the account, if any; but it is not now necessary for him to say so in his citation and execution,—see section III., note (*h*).

(*c*) If the citation is made *under the Citation Amendment Act* of 1882, the last clause will be as follows: This notice [with a copy of the account founded on (*d*)], intimated upon the fifteenth day of January One thousand eight hundred and eighty-four years, between the hours of three and four o'clock afternoon, by me, John Thomas, Sheriff Officer.

(*d*) These words, though they may with advantage be inserted, and generally are, are not essential,—see section III., note (*h*).

3. *Execution of Citation of Defender* (*a*.)

Upon the day of One thousand eight hundred and , I duly summoned the above-designed *E. F.*, defender, to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification above set forth. This I did by leaving a full copy of the above summons or complaint, with a citation thereto annexed,* for the said defender [in his hands personally, *or otherwise* (*b*), *as the case may be.*]

J. T., Sheriff Officer.

* If there is an account mentioned in the complaint, the officer must serve a copy of it along with a copy of the summons or complaint.

(*a*) See notes (*a*) and (*b*) to the preceding Form. The citation may be made in four ways,—by personal service, as above, or by registered letter under the Citation Amendment Act, or by delivery to an inmate of the house, or by a lockhole citation. In the latter three cases the executions would be as follows:—

1. *Execution of Citation under Citation Amendment Act of* 1882 (*b*).

This summons executed by me, John Thomas, Sheriff Officer, against Edward Fraser, defender, by posting on fourth January One thousand eight hundred and eighty-four years, between the hours of three and four o'clock afternoon, at the General Post Office of Glasgow, a copy of the same to him, with citation subjoined [and a copy of the account mentioned in said summons (*c*)], in a registered letter addressed as follows—viz., "Mr Edward Fraser, accountant, 146 Wilson Street, Glasgow."

John Thomas, Sheriff Officer.

The post-office receipt for the registered letter must accompany the execution.

2. *Execution of Citation by Delivery.*

Upon the twelfth day of February One thousand eight hundred and eighty-four years, I duly summoned the above-designed James Murphy to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification above set forth. This I did by leaving a copy of the above complaint [with a copy of the account founded on (*c*)], with a citation thereto annexed, for the said defender, in the hands of a servant within his dwelling-house, at No. 14 Glenfield Road, Glasgow, to be given to him, as, after due inquiry, I could not find himself personally.

John Thomas, Sheriff Officer.

3. *Execution of Lockhole Citation* (*b*) (*d*).

Upon the twelfth day . . . &c., *ut supra*, above set forth. This I did by affixing and leaving a copy of the above complaint [with a copy of the account founded on (*c*)], with a citation thereto annexed, for the said defender in the lockhole of the most patent door of his dwelling-house, at No. 14 Glenfield Road, Glasgow, as, after my giving six audible knocks on said door, as use is, I could not get access to said house, nor find him personally.

John Thomas, Sheriff Officer.

(*b*) See section III., note (*j*).

(*c*) See note (*d*) to the preceding Form.

(*d*) A registered letter must be sent to the defender at his most likely last known address, enclosing a copy of the summons, and the registrati receipt must accompany the execution. This mode of citation is now usual, and is competent only where the defender is refusing access or cealing himself to avoid citation, or where he has left within the prece forty days, and his present address is unknown.

4. *Execution* [illegible] *of Counter* [illegible] *by Defend*

Pursuer (1)

the small debt action to which the said defender was summoned to appear before the Sheriff at , upon the day of at of the clock. This I did by leaving a copy of the above account [*or* notice of claim, *shortly explaining it,*] for the said pursuer [in his hands personally, *or otherwise* (*d*) *as the case may be.*]

J. T., Sheriff Officer.

(*a*) If *under the Citation Amendment Act* of 1882, it will be as follows: This counter account [or counter claim for damages for breach of contract] intimated by me, John Thomas, Sheriff Officer, to Charles Dickson, pursuer, by posting, on the seventh day of January One thousand eight hundred and eighty-four years, between the hours of three and four o'clock afternoon, at the General Post Office of Glasgow, a copy of the same to him, in a registered letter addressed as follows, viz.: "Mr Charles Dickson, 49 Monmouth Street, Glasgow."

John Thomas, Sheriff Officer.

The post-office receipt for the registered letter must accompany the execution. As to such citation, see section III., note (*j*).

(*b*) For Form of Notice, see No. 12 of Supplementary Forms, p. 138.

(*c*) For Form of Counter Claim, see No. 11 of Supplementary Forms, p. 138.

(*d*) See section III., note (*j*).

5. *Citation for Witnesses* (*a*).

M. N. [*design him,*] you are hereby summoned to appear before the Sheriff of the shire of or his Substitute, in the Court House at upon the day of One thousand eight hundred and at of the clock, to bear witness (*b*) for the [pursuer *or* defender *as the case may be*] in the summons or complaint at the instance of *C. D.* [*design him,*] against *E. F.* [*design him,*] and that under the penalty of forty shillings if you fail to attend.

This notice (*c*) served on the day of by me,

J. T., Sheriff Officer.

(*a*) As to the citation of witnesses, see section XII. and notes.

(*b*) A *Citation for a Haver will run,*—Michael Nolan, grocer, 46 Warwick Street, Glasgow, you are hereby summoned . . . *ut supra* . . . of the clock, to with you, exhibit and produce the cash-books, day-books, and ledgers you in connection with your business for the year 1883, as a haver in the summons at the instance of, &c. . . .

(*c*) If the citation is made *under the Citation Amendment Act* of 1882, the last clause will run as follows: This notice intimated on the third day of January One thousand eight hundred and eighty-four years, between the hours of three and four o'clock afternoon by me,

John Thomas, Sheriff Officer.

6. *Execution of Citation of Witnesses* (*a*.)

Upon the day of One thousand eight hundred and I duly summoned *M. N.*, &c. [*design them,*] to appear before the Sheriff of the shire of or his Substitute, in the Court House at upon the day of One thousand eight hundred and at of the clock, to bear witness (*b*) for the in the summons or complaint at the instance of *C. D.* [*design him,*] against *E. F.* [*design him.*] This I did by delivering a just copy of citation, signed by me, to the said *M. N.* [personally, *or otherwise,* (*c*) *as the case may be.*]

J. T., Sheriff Officer.

(*a*) Though the citation can be given *under the Citation Amendment Act* of 1882, the short form of execution there provided is not very suitable as an execution of citation of witnesses or havers under the Small Debt Act. The present form may therefore be retained up till the last clause, which will run as follows: This I did by posting, on the third day of January One thousand eight hundred and eighty-four years, between the hours of three and four o'clock afternoon, at the General Post Office of Glasgow, a just copy of citation, signed by me, to each of them, in registered letters addressed as follows—viz., "Mr John Smith, measurer, Denton Street, Partick," and "Mrs Mary Cameron or Brown, 25 Gogar Terrace, Hillhead."

John Thomas, Sheriff Officer.

The post-office receipt for the registered letters must accompany the execution. For further details see section III., note (*j*).

If it be wished to follow *the statutory form*, it might be: The warrant of citation against witnesses and havers in the summons [or complaint] at the instance of C. D. [*design him*] against E. F. [*design him*], executed by me, John Thomas, Sheriff Officer, against Michael Nolan, grocer, 46 Warwick Street, Glasgow; and David Watson, porter there, witnesses, by posting, &c., *ut supra.*

(*b*) The *Execution of Citation of a Haver* will run: Upon the, &c. . . . *ut supra* . . . of the clock, to bring with him, exhibit and produce the cash-books, day-books, and ledgers kept by him in connection with his business for the year 1883, as a haver for the defender, in the summons at the instance of, &c. Or the alternative form above suggested may be adopted.

(*c*) See section III., note (*j*).

7. *Decree for Pursuer in a Civil Cause* (*a*).

At the day of One thousand eight hundred and the Sheriff of the shire of finds the within-designed defender, liable to the pursuer in the sum of with of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.

J. P., Sheriff Clerk.

(*a*) See section XVII., note (*c*), and Supplementary Forms Nos. 15, 17, and 19, pp. 139 and 140.

8. *Summons of Complaint for Statutory Penalty* (*a*).

A. B., Sheriff of the shire of to Officers of Court, jointly and severally.

Whereas it is humbly complained to me by *C. D.*, Procurator Fiscal of Court, [*or where a private party only,*] *G. H.* [*designation,*] [*or where a private party prosecutes with the concurrence of the Procurator Fiscal,*] *G. H.*, with concurrence of *C. D.*, Procurator Fiscal of Court, that *E. F.* [*designation,*] defender, has incurred the penalty of imposed by the Act of Parliament [*mention the Act,*] the said defender having [*state the offence, specifying time and place;*] therefore the said defender ought to be decerned and ordained to make payment of the said penalty, with expenses [*state to whom and in what proportions payable, and the term of imprisonment where the same is the mode of recovery:*] Herefore it is my will, that on sight hereof ye lawfully summon the said defender to compear before me or my Substitute in the Court House at upon the day of at of the clock, to answer at the complainer's instance in the said matter, with certification, in case of failure, of being held as confessed; and that ye cite witnesses and havers for both parties to compear at the same place and date to give evidence in the said

matter. Given under the hand of the Clerk of Court at the day of

J. P., Sheriff Clerk.

Concurs *C. D.*, Procurator Fiscal.

[*For citation for defender and execution thereof, and citation for witnesses and execution thereof, see Nos.* 2, 3, 5, *and* 6, *respectively.*]

(*a*) See section II., note (*d*).

9. *Decree for Prosecutor in Prosecution for Penalty.*

At the day of One thousand eight hundred and , the Sheriff of the shire of finds that the within-designed *E. F.*, defender, has incurred the penalty of as libelled, payable to [*if there is a power to mitigate and mitigation, add,* "which is hereby mitigated to the sum of ,"] and also finds the said defender liable in of expenses to the complainer, and decerns and ordains instant execution by arrestment, and also execution by poinding and sale and imprisonment, if the same be competent [*stating the term of imprisonment, where it is fixed,*] after free days.

J. P., Sheriff Clerk.

10. *Decree of Absolvitor, with Expenses.*

[*The following will answer either for Civil Causes or Prosecutions for Penalties.*]

At the day of One thousand eight hundred and the Sheriff of the shire of assoilzies the within-designed *E. F.*, defender, from the within complaint, and finds the within-designed *C. D.*, pursuer, liable to him in the sum of of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale after free days.* (*a*)

J. P., Sheriff Clerk.

* Where the pursuer does not return the original summons, the above decree may be written on the copy served on the defender.

(*a*) If there are more defenders than one, and they are successful and wish extract, it must be written on their copies.

11. *Charge on Decree.*

E. F., above designed, you are hereby charged to implement the decree of which, and of the complaint whereon the same proceeded, the above is a copy, within days from this date, under pain of poinding and sale without further notice. This charge given by me, on the day of before *O. P.* [*design him.*]

J. T., Sheriff Officer.

12. *Execution of Charge.*

[*To be on the same Paper with the Complaint and Decree.*]

On the day of One thousand eight hundred and , I duly charged *E. F.*, above designed, to implement the above decree, within the time and under the pains therein expressed. This I did by delivering a just copy of the foregoing complaint and decree, and a charge thereto annexed subscribed by me, to the said *E. F.* [personally, *or as the case may be,*] before *O. P.* [*design him,*] witness hereto, with me subscribing.

J. T., Sheriff Officer.

O. P., witness.

SCHEDULE (B.)

Summons of Sequestration and Sale at the instance of a Landlord (*a.*)

A. B., Sheriff of the shire of to officers of Court, jointly and severally.

Whereas it is humbly complained to me by *C. D.*, pursuer [*design him,*] that *E. F.*, defender [*design him,*] is owing to the pursuer the sum of , being the rent for [*describe the premises,*] possessed by him from to

[*if any partial payments have been made let them be here stated* (*b*),] and which rent [*or* balance of rent, *as the case may be,*] the said defender refuses or delays to pay; therefore warrant ought forthwith to be granted to inventory, appraise, sequestrate, and, if need be, secure the goods and effects upon or within the said premises (*c*), and decree ought to be pronounced decerning the defender to make payment of the said rent [*or* balance of rent, *as the case may be,*] to the pursuer, with expenses, and warrant ought also to be granted to sell the goods and effects sequestrated in payment of the said rent [*or* balance of rent, *as the case may be,*] and expenses: Herefore it is my will, that on sight hereof ye lawfully summon the said defender to compear before me or my Substitute, within the Court House of upon the day of at of the clock, to answer at the pursuer's instance in the said matter, with certification, in case of failure, of being held as confessed, and decree and warrant pronounced as craved: And my will further is, that ye forthwith inventory, sequestrate, and if need be, secure the goods and effects upon or within the said premises until the further orders of Court, or until the said defender shall make payment to the pursuer of the amount of the rents pursued for, with the expenses, or shall consign in the hands of the Clerk of Court the amount of the rents pursued for, with two pounds sterling to cover expenses; and that ye cite witnesses and havers for both parties to compear at the said place and date, to give evidence in the said matter. Given under the hand of the Clerk of Court at the . day of

J. P., Sheriff Clerk.

[*After hearing the cause, the decree and procedure in the sequestration and sale will be similar to the forms in ordinary causes, the words* "sequestration" *and* "sequestrated" *being introduced when necessary, instead of* (*d*) "poinding" *and* "poinded."]

(*a*) See section V., and notes. Where the sequestration is used only in security the first of the following forms will be proper; where the rent is due

by an absent or deceased person and the object is to attach the goods, the second form can be used; and where the position of matters is similar but more dubious the third form may be resorted to.

1. *Sequestration in Security.*—Whereas, &c. . . . *defender*, will be owing to the pursuer the sum of six pounds, being the rent for the current half-year of the shop, No. 481 Corunna Street, Glasgow, let by the pursuer to him for the period of one year from Whitsunday 1882, and which will become due and payable at the term of Whitsunday 1883; and the defender is in arrears with his rent [*or*, is removing his effects, *or*, his creditors are doing diligence], whereby the pursuer's right of hypothec for said rent is in danger of being defeated or lost: Therefore warrant ought forthwith to be granted to inventory, appraise, sequestrate, and, if need be, secure the goods and effects upon or within the said premises; and, on the said term of payment being first come and bygone, decree ought to be, &c.

2. *Sequestration directed against a Custodier.*—Whereas it is humbly complained to me by Charles Dickson, grocer, 41 Calderbank Road, Glasgow, *pursuer*, that Hugh Dempster, chemist, 26 Queen Street, Maryhill, *defender*, is custodier of the goods, gear, and other effects of the deceased Francis Montgomery, portioner, 49 Melville Lane, Hillhead, and that there will be owing to the pursuer the sum of ten pounds, being one quarter's rent of the dwelling-house at 49 Melville Lane, foresaid, let by the pursuer to the said Francis Montgomery for the period of one year from Whitsunday 1882, and which will become due and payable at the term of Whitsunday 1883; and the defender being only custodier of said effects there is danger of their being dilapidated or lost, whereby the pursuer's right of hypothec for said rent will be defeated or lost: Therefore warrant ought forthwith to be granted to inventory, appraise, sequestrate, and, if need be, secure the goods and effects upon or within the said premises; and, on the said term of payment being first come and bygone, warrant ought also to be granted to sell . . . &c., *as in statutory Form, omitting the words* "and decree" . . . orders of Court, or until payment shall be made to the pursuer of the amount of the rent pursued for, with expenses, or until consignation shall be made in the hands of the Clerk of Court of the amount of the rent, &c., *ut supra.*

3. *Sequestration directed against a Representative.*—Whereas it is humbly complained to me by Arthur Hill, artist, Mineral Bank, Maryhill, *pursuer*, that George Williamson, carpenter, High Street, Partick, as executor of the deceased Andrew Williamson, 247 High Street, Partick, or as vitious intromitter (*e*) with the goods, gear, and other effects of the said deceased Andrew Williamson, or, as representing him on one or other of the passive titles (*e*) known in law, *defender*, will be owing to the pursuer the sum of five pounds, or otherwise, that the said defender being the custodier of said goods, gear, and effects, such sum will be owing to the pursuer, being one quarter's rent of the dwelling-house at 247 High Street, Partick, foresaid, let by the pursuer to the said Andrew Williamson for the year from Whitsunday 1882, and which will become due and payable at the term of Whitsunday 1883: And the defender being in course of removing or disposing of said effects, or at least there being danger that they will be removed from his custody, or will become dilapidated or lost, whereby the pursuer's right of hypothec for said rent will be defeated or lost: Therefore warrant ought, &c. . . . *ut supra*, No. 1.

(*b*) In detail.

(*c*) As to what goods and effects may be sequestrated, see section V., note (*f*).

(*d*) This is an obvious error. The words "sequestration" and "sequestrated" are not to be used *instead* of, but *in addition to* "poinding" and "poinded." The Sheriff grants decree against the defender for the rent, and warrant of sale of his effects,—*i.e.*, so far as they are sequestrable or have been sequestrated. But the defender may be possessed of effects which cannot be, or have not been, sequestrated, but may be poinded or arrested. Unless, therefore, the words poinding and poinded are retained, a pursuer may lose the best part of his remedy.

(*e*) As to vitious intromission and what it consists in and what liability it entails, and also as to passive titles, see notes (*s*) and (*t*) on p. 68, note (*l*) on p. 146, and note (*m*) on p. 262 of my 'Handbook of Styles.'

SCHEDULE (C.)

1. *Arrestment on the Dependence of an Action.*

By virtue of a warrant of the Sheriff of the shire of , given under the hand of the Clerk of Court at on the day of for arrestment on the dependence of an action raised before the said Sheriff at the instance of *C. D.* [*design him,*] complainer, against *E. F.* [*design him* (*a*),] defender, I hereby fence and arrest, in the hands of you *K. L.* [*design him,*] all sums of money owing by you to the said defender, or to any other person, for his use and behoof, and all goods and effects in your custody belonging to the said defender [*or, in the case of ships or maritime subjects, say,* I hereby fence and arrest the ship *M.* of *N.* presently lying in the harbour of *O.*, with her boats, furniture, and apparelling, or other maritime subjects,] and that to an amount or extent not exceeding the value of twelve pounds sterling, all to remain under sure fence and arrestment, at the complainer's instance, until due consignation be made, or until sufficient caution be found as accords of law. This I do on the day of before *O. P.* [*design him,*] by delivery of a copy of this execution to you [personally, *or as the case may be.*]

J. T., Sheriff Officer.

(*a*) Care must be taken to design the arrestee in the character or characters in which he owes the money. See section VI., note (*c*).

2. *Execution of Arrestment on the Dependence of an Action.*

[*To be on the same paper with the summons or other warrant of arrestment.*]

Upon the day of , one thousand eight hundred and , betwixt the hours of and , by virtue of the foregoing warrant of arrestment, I lawfully fenced and arrested in the hands of *K. L.* [*design him,*] all sums of money owing by him to the foresaid *E. F.*, defender, or to any other person for his use and behoof, and all goods and effects in the custody of the said arrestee belonging to the said defender, [*or, in case of ships or maritime subjects, as before,*] and that to an amount or extent not exceeding the value of twelve pounds sterling, all to remain under sure fence and arrestment, at the foresaid complainer's instance, until due consignation be made, or until sufficient caution be found as accords of law. This I did by delivering a just copy of arrestment, subscribed by me, to the said arrestee personally [*or as the case may be,*] before *O. P.* [*design him,*] hereto with me subscribing.

O. P., Witness. *J. T.*, Sheriff Officer.

3. *Bond or Enactment of Caution for Loosing Arrestment.*

At on day of one thousand eight hundred and , compeared *G. H.* [*design him,*] who hereby judicially binds himself, his heirs, executors, and successors, as cautioners acted in the Sheriff Court books of the shire of , for *E. F.* [*design him,*] common debtor, against whom arrestment was used at the instance of *C. D.* [*design him,*] in the hands of *K. L.* [*design him,*] on the day of in virtue of [*describe the warrant,*] dated the day of , that the sums of money, goods and effects owing or belonging to the said common debtor arrested as aforesaid, shall be made furthcoming as accords of law.

G. H.

4. *Certificate for Loosing Arrestment used on the Dependence of an Action.*

Whereas arrestment was used on the dependence of an action at the instance of *C. D.* [*design him,*] against *E. F.* [*design him,*] in the hands of *K. L.* [*design him, or as the case may be,*] on the day of , by virtue of a warrant of the Sheriff of the shire of given under the hand of the Clerk of Court at the day of : And whereas the said *E. F.* has now made sufficient consignation in the hands of the Sheriff Clerk of [*or, if caution has been found, say*] has found sufficient caution acted in the Sheriff Court books of by *G. H.* [*design him,*] his cautioner, [*here state the nature of the caution,*] in order to the loosing of the said arrestment, warrant for loosing the said arrestment is hereby granted accordingly. Given under the hand of the Clerk of Court at the day of

J. P., Sheriff Clerk.

5. *Intimation of Loosing Arrestment.*

[*To be on the same paper with a copy of the foregoing warrant.*]

K. L. [*design him,*] take notice, that by virtue of the warrant whereof the above is a copy, the arrestment on the dependence of the action above mentioned, used in your hands at the instance of the foresaid *C. D.* against the foresaid *E. F.*, is loosed and taken off. This notice served on the day of by me,

J. T., Sheriff Officer.

6. *Execution of Intimation of Loosing Arrestment* (*a*).

[*To be on the same paper with the original warrant for loosing the arrestment.*]

Upon the day of one thousand eight hundred and I duly intimated the above warrant to *K. L.* [*design him,*] arrestee. This I did by

leaving a full copy thereof and intimation thereon, subscribed by me, for him [in his hands personally, *or as the case may be.*]

J. T., Sheriff Officer.

(*a*) If the intimation was given under the Citation Amendment Act it might be: This warrant of loosing of arrestment intimated by me John Thomas, Sheriff Officer, to Kenmure Lyon, merchant, Airdrie, arrestee, by posting, on the sixth day of March one thousand eight hundred and eighty-three years, between the hours of three and four o'clock afternoon, at the General Post Office of Glasgow, a copy of the same to him, with intimation subjoined, in a registered letter addressed as follows, viz.: "Mr Kenmure Lyon, merchant, Airdrie."

John Thomas, Sheriff Officer.

The post-office receipt for the registered letter must accompany the execution.

SCHEDULE (D.)

1. *Summons or Complaint in Cases of Furthcoming* (*a*).

A. B. Sheriff of the Shire of to officers of Court, jointly and severally.

Whereas it is humbly complained to me by *C. D.* [*designation,*] upon and against *K. L.* [*designation* (*b*),] arrestee, and *E. F.* [*designation,*] common debtor, that the said common debtor is owing the complainer the sum of contained in [*describe shortly the decreet, or bill, or bond et cætera, by which the debt is constituted,*] and that the complainer on the day of years, in virtue of a warrant by dated the day of , arrested in the hands of the arrestee [*here insert the terms of the arrestment used,*] which ought to be made furthcoming to the complainer: Therefore the said arrestee, and the said common debtor for his interest, ought to be decerned and ordained to make furthcoming, pay, and deliver to the complainer the money, goods, and effects arrested as aforesaid, or so much thereof as will satisfy and pay the said sum (*c*) of owing to the complainer as aforesaid: Herefore it is my will, that on sight hereof ye lawfully summon the said arrestee, and the said common debtor for his interest, to compear before

me or my Substitute in the Court House at upon the day of years, at of the clock, to answer at the complainer's instance in the said matter, with certification in case of failure of being held as confessed; and that ye cite witnesses and havers for both parties to compear at the said place and date to give evidence in the said matter. Given under the hand of the Clerk of Court at the day of years.

J. P., Sheriff Clerk.

[*The citations and executions, and decree for the defender, with expenses, may be the same as in Schedule* (*A.*)]

(*a*) See section IX. and notes.
(*b*) As in the arrestment,—see section VI., note (*c*).
(*c*) In regard to expenses, see section IX., note (*c*).

2. *Decree for the Pursuer in Cases of Furthcoming.*

At the day of one thousand eight hundred and , the Sheriff for the shire of decerns and ordains the within-designed , arrestee, to make furthcoming, pay, and deliver to the also within-designed , pursuer [*if the arrestee has money arrested in his hands, the rest of the judgment will be the same as in ordinary cases; if there are goods and effects to be made furthcoming, the rest of the judgment will be as follows:*] the arrested goods and effects following; videlicet, , and grants warrant to sell the same, or as much thereof as will satisfy the sum of and of expenses of process and the expense of sale; and, failing the said arrestee making furthcoming, and delivering the said goods and effects within , then to make payment to the said pursuer of the said sum of , for recovery of which sums, the said period being elapsed without furthcoming and delivery of the said goods and effects, ordains instant execution by arrestment, and also execution to pass hereon by poind-

ing and sale and imprisonment, if the same be competent, after free days.

J. P., Sheriff Clerk.

SCHEDULE (E.)

1. *Summons of Multiplepoinding* (*a*).

A. B., Sheriff of the shire of , to , officers of Court, jointly and severally.

Whereas it is humbly shown to me by *A. B.*, pursuer, [*design him,*] that he is holder of [*here state the fund or subject in medio, and if necessary refer to the account thereof produced,*] belonging to *E. F.*, common debtor [*design him,*] which fund the pursuer is ready to pay [*or* deliver] to the said common debtor, or to whomsoever shall be found to have best right thereto, but he is distressed by claims being made thereon by the persons following, videlicet, [*here state the names and designations of all the claimants, so far as known to the holder or raiser of the action;*] wherefore the said pursuer ought to be found liable only in once and single payment [*or* delivery] of the said fund or subject to whomsoever of the said parties or others interested shall be found by me to have best right thereto [*or in the meantime* (*b*) *consignation ought to be ordered of the fund or subject, or sale of the subject in medio*] deducting the pursuer's expenses, and decree ought to be pronounced accordingly, and all other parties ought to be prohibited from molesting the pursuer thereanent in all time coming: Herefore it is my will that, on sight hereof, ye lawfully summon the said common debtor and the said claimants (*c*) [*and in case of the action being raised by a claimant in name of the holder, it will be necessary also to summon the nominal pursuer* (*d*),] to compear before me or my Substitute in the Court House of upon the day of , at of the clock, to attend to their several interests in the said matter, with certification in case of

failure of being held as confessed; requiring you also to deliver to the said common debtor a copy of any account produced with the summons, and that ye cite witnesses and havers for all parties to compear at the said place and date to give evidence in the said matter. Given under the hand of the Clerk of the Court at , the day of . *J. P.*, Sheriff Clerk.

(*a*) See section X. and notes.

(*b*) The holder of the fund may wish to get rid of it without waiting till the right to it be settled; or the real raiser may wish to get the fund out of the hands of the nominal raiser.

(*c*) If they reside in other counties the warrant will have to be indorsed.

(*d*) The action has to be raised in the jurisdiction he is subject to.

2. *Form of Claim in Multiplepoinding.*

I, *A. B.* [*design him,*] hereby claim to be preferred on the fund in the multiplepoinding raised in name of [*mention the raiser,*] against [*mention the defenders,*] for [*state the claim*] of principal due to me by [*here state generally the ground of debt, whether by bond, bill, account, &c., as the case may be,*] with interest (*a*) from , with expenses.

A. B.

(*a*) If payment was due by decree, bond, bill, or other liquid document of debt, or on a certain day, under agreement or by custom, interest will run from the date on which the payment was due. But where the account is an ordinary mercantile one, and payment was not due on any specified day, interest ought not, as a rule, it is thought, to be awarded. The conflicting opinions on this point will be found stated in Guthrie's Cases, *voce* Interest, pp. 227 to 237. See also *Macrae* v. *Macrae*, 23 J. of J. 218.

3. *Form of Interlocutor of Preference.*

Prefers [*here design him,*] claimant for [*here specify the sum.*]

[*To be signed by the Sheriff.*]

[*The citations and procedure to be as nearly as may be in the forms in other causes, and warrant to sell the subjects forming the fund in medio to be granted and carried into effect in the ordinary form.*]

SCHEDULE (F.) (*a*)

No.	Dates of Complaints.	Pursuers.	Defenders.	Nature and Amount.	How Cited.	By what Officer.	Leave and Cause of Procurator's Appearance.	Interlocutors and Decrees.

N.B.—After the name of each pursuer and defender let the letter P. or A. be added, in order to mark whether the party was present or absent when the case was called; and should the party appear by or with any other person or a procurator, his or her name shall be marked as so appearing. Let expenses be also entered under the head of "Interlocutors."

(*a*) Under section XVII. the Sheriff has power to order additional entries to be made. It will be found convenient to have a column for the date of the last or next enrolment of the case, another for the date of any sist and to whom issued, and a third for the date of the extract and to whom issued. These allow the cause to be readily traced, and yield the information required for the annual Judicial Statistics.

SCHEDULE (G.)

Report of Sequestration or Poinding and Sale (*a*).

[*To be varied according to circumstances.*]

Report of the sequestration or poinding and sale at the instance of *C. D.* [*design him,*] against *E. F.* [*design him.*]

Lots.	Effects.	Appraised at	Sold at
		£ s. d.	£ s. d.
1.	An eight-day clock, ...	4 0 0	4 10 0
2.	Six chairs at 6s., ...	1 16 0	1 18 0
3.	One table, ...	0 8 0	0 8 0
4.	One chest of drawers, ...	1 12 0	1 12 0
		7 16 0	8 8 0

Upon the day of One thousand eight hundred and between the hours of and by virtue of a decree of the Sheriff of given under the hand of the Clerk of Court at on the day of at the instance of *C. D.* above designed, against *E. F.* above designed, for payment of the sums of I passed with the witnesses and appraisers after named and designed to , and then and there, after demanding payment of the sums contained in the said decree past due, and payment not being made, I poinded the effects above enumerated belonging to the said debtor, and after making an inventory or list thereof, and getting the same duly appraised on oath at the several values respectively above specified in the first column, and amounting in all to [*here insert the amount in words,*] and leaving a copy of such inventory or list and appraisement with the said debtor personally [*or as the case may be,*] I carried the said effects to the (*b*) of [*or as the case may be,*] and there betwixt the hours (*c*) of and and after public notice of at least hours (*d*), I sold the said effects by public roup to the highest bidder, at the prices above specified in the second column for each lot respectively,* and amounting in all to [*here insert the amount in words*]; these things were so done before and with *O. P.* and *Q. R.* [*design them,*]

* *If the effects are not sold, the tenor of the report must be altered according to the state of the fact; for instance,* ["I exposed the said goods and effects to public sale, but no person having offered the appraised value, therefore I declared the same to belong to the said *C. D.* at the said respective appraised values in payment to that amount of the sums in said decree."] *In case the goods poinded, or part of them, shall sell for more than the sums in the decree, and expenses of poinding and sale, say,* ["I sold part of the said effects—viz., lots 1, 2, and 3, by public roup to the highest bidder at the prices above specified in the second column for each of said lots respectively, and amounting in all to [*here insert the amount in words*]; and I returned (*e*) to the said debtor the sum of being the overplus of the price, after payment of the sum decerned for past due, and the sum of being the expenses of poinding and sale conform to the Act of Parliament; and I also returned to the said debtor the effects specified in the other lots above enumerated."]

witnesses and appraisers, in the premises hereto with me subscribing.

J. T., Sheriff Officer.

O. P., Witness and appraiser.

Q. R. Witness and appraiser.

Reported to the Sheriff Clerk of the shire of at the day of by me,

J. T., Sheriff Officer.

(*a*) See sections V. and XX. and notes thereto.

(*b*) Cross, or most public place, or other place appointed by general or special regulation.

(*c*) Not before eleven and not after three o'clock.

(*d*) Two at least.

(*e*) If the debtor cannot be found, the overplus is to be consigned with the Sheriff Clerk.

SCHEDULE (H.)

[This Schedule contained a list of the places at which Circuit Small Debt Courts were to be held; but the list has been so much changed that it was thought it would be more serviceable to prepare a complete list of the Small Debt Courts in Scotland and their sittings.]

ABERDEEN	Aberdeen	Thursday.
	Peterhead	Friday.
	Fraserburgh	Last Friday of month.
	Huntly	Quarterly.
	Turriff	Do.
ARGYLL	Inverary	Friday.
	Campbeltown	Do.
	Tobermory	Wednesday.
	Bowmore	Quarterly.
	Dunoon	Eight times.
	Lochgilphead	Quarterly.
	Oban	Do.
AYR	Ayr	Thursday.
	Kilmarnock	Do.
	Beith	Quarterly.
	Cumnock	Do.
	Girvan	Three times.
	Irvine	Six times.
BANFF	Banff	Tuesday.
	Buckie	Quarterly.
	Dufftown	Do.
	Keith	Third Satur. of month.
	Tomintoul	Half-yearly.

BERWICK	Duns	Eight times.
	Ayton	Quarterly.
	Coldstream	Do.
	Greenlaw	Seven times.
	Lauder	Three times.
BUTE	Rothesay	Thursday.
	Brodick	Quarterly.
	Millport	Half-yearly.
CAITHNESS	Wick	Tuesday.
	Lybster	Every fifth Wednesday.
	Thurso	Every fifth Thursday.
CLACKMANNAN	Alloa	Wednesday.
CROMARTY	Cromarty	First Thursday of month.
DUMBARTON	Dumbarton	Tuesday.
	Kirkintilloch	Quarterly.
DUMFRIES	Dumfries	Tuesday.
	Annan	Quarterly.
	Langholm	Do.
	Lockerbie	Do.
	Thornhill	Do.
EDINBURGH	Edinburgh	Wednesday.
	Leith	Tuesday.
	Dalkeith	Third Thurs. of month.
ELGIN	Elgin	Wednesday.
	Fochabers	Three times.
	Forres	Six times.
	Grantown	Quarterly.
	Rothes	Do.
FIFE	Cupar	Thursday.
	Dunfermline	Tuesday.
	Anstruther	Quarterly.
	Auchtermuchty	Do.
	Kirkcaldy	Wednesday.
	Leven	Quarterly.
	Newburgh	Do.
	St Andrews	Do.
FORFAR	Dundee	Tuesday.
	Forfar	Thursday.
	Arbroath	Six times.
	Brechin	Do.
	Kirriemuir	Do.
	Montrose	Do.
HADDINGTON	Haddington	Alternate Thursdays.
	Dunbar	Six times.
	North Berwick	Quarterly.
	Tranent	Six times.
INVERNESS	Inverness	Friday.
	Fortwilliam	Wednesday.
	Lochmaddy	Do.
	Portree	Do.

INVERNESS—*cont.*	Beauly	Three times.
	Fort Augustus	Do.
	Grantown	Do.
	Kingussie	Do.
KINCARDINE	Stonehaven	Wednesday.
	Banchory	Half-yearly.
	Laurencekirk	Do.
KINROSS	Kinross	Tuesday.
KIRKCUDBRIGHT	Kirkcudbright	Alternate Fridays.
	Castle Douglas	Quarterly.
	Creetown	Three times.
	Maxwelltown	Quarterly.
	New Galloway	Three times.
LANARK	Glasgow	Mond., Wed., Thurs.
	Airdrie	Tuesday.
	Hamilton	Friday.
	Lanark	Monday.
	Wishaw	Every third Thursday.
LINLITHGOW	Linlithgow	Friday.
	Bathgate	Quarterly.
NAIRN	Nairn	Friday.
ORKNEY	Kirkwall	Tuesday.
	St Margaret's Hope	Three times.
	Stromness	Quarterly.
PEEBLES	Peebles	Friday.
PERTH	Perth	Tuesday.
	Dunblane	Wednesday.
	Aberfeldy	Three times.
	Auchterarder	Quarterly.
	Blairgowrie	Do.
	Coupar Angus	Do.
	Crieff	Do.
	Dunkeld	Three times.
	Kincardine-on-Forth	Quarterly
RENFREW	Paisley	Thursday.
	Greenock	Wednesday.
	Pollokshaws	Second Friday of month.
ROSS	Dingwall	Friday.
	Stornoway	Tuesday.
	Tain	Do.
	Fortrose	Quarterly.
	Invergordon	Do.
	Jeantown	Half-yearly.
	Ullapool	Do.
ROXBURGH	Jedburgh	Thursday.
	Hawick	Six times.
	Kelso	Do.
	Melrose	Three times.
SELKIRK	Selkirk	Wednesday.
	Galashiels	Six times.

SHETLAND	Lerwick	Wednesday.
STIRLING	Stirling	Thursday.
	Falkirk	Wednesday.
	Kilsyth	Quarterly.
	Lennoxtown	Do.
SUTHERLAND	Dornoch	Tuesday and Friday.
	Helmsdale	Three times.
	Melvich	Do.
	Scourie	Once.
	Tongue	Three times.
WIGTOWN	Wigtown	Tuesday.
	Stranraer	Alternate Thursdays.

SCHEDULE (I.)

Notice.

A. B. [*add designation,*] residing at is the Depute Sheriff Clerk to whom application for summonses and everything else necessary for the Sheriff Circuit at this place for Small Debt causes must be made [*or, in case the Depute shall not be resident, say A. B.* [*add designation and place of residence,*] is the Depute Sheriff Clerk, who will officiate at in the Sheriff's Small Debt Circuit Court, and *C. D.* [*add designation,*] residing at is the person who will issue summonses or complaints to be brought in such court.]

Date.
Place.

SCHEDULE (K.)

Notice.

The Sheriff will hold Circuit Courts for Small Debt causes at on the day of at of the clock, and on every [*fix the time periodically, or if not, new notice to be given.*]

A. B. [*add designation and residence*] is the Clerk for this place.

Date.
Place.

EMPLOYERS AND WORKMEN ACT.

EXCERPT FROM 38 & 39 VICTORIA, CAP. 90.

Jurisdiction in disputes between employers and workmen.

4. A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction (*a*), and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court (*b*): Provided that in any proceeding in relation to any such dispute the court of summary jurisdiction—

(1.) Shall not exercise any jurisdiction where the amount claimed exceeds ten pounds; and

(2.) Shall not make an order for the payment of any sum exceeding ten pounds, exclusive of the costs incurred in the case, and

(3.) Shall not require security to an amount exceeding ten pounds from any defendant or his surety or sureties.

(*a*) In general the functions of a Court of Summary Jurisdiction are to try criminal and *quasi* criminal cases.

(*b*) These are set forth in section three, and are as follows:—

(1.) It may adjust and set off, the one against the other, all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; and,

(2.) If, having regard to all the circumstances of the case, it thinks it just

to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages, or other sums due, as it thinks just; and,

(3.) Where the Court might otherwise award damages for any breach of contract it may, if the defendant be willing to give security to the satisfaction of the Court for the performance by him of so much of his contract as remains unperformed, with the consent of the plaintiff, accept such security, and order performance of the contract accordingly, in place either of the whole of the damages which would otherwise have been awarded, or some part of such damages.

The security shall be an undertaking by the defendant and one or more surety or sureties that the defendant will perform his contract, subject on non-performance to the payment of a sum to be specified in the undertaking.

Any sum paid by a surety on behalf of a defendant in respect of a security under this Act, together with all costs incurred by such surety in respect of such security, shall be deemed to be a debt due to him from the defendant; and where such security has been given in or under the direction of a Court of Summary Jurisdiction, that Court may order payment to the surety of the sum which has so become due to him from the defendant.

Jurisdiction in disputes between masters and apprentices.

5. Any dispute between an apprentice to whom this Act applies and his master, arising out of or incidental to their relation as such, (which dispute is herein-after referred to as a dispute under this Act,) may be heard and determined by a court of summary jurisdiction.

Powers in respect of apprentices.

6. In a proceeding before a court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, the court shall have the same powers as if the dispute were between an employer and a workman, and the master were the employer and the apprentice the workman, and the instrument of apprenticeship a contract between an employer and a workman, and shall also have the following powers:

(1.) It may make an order directing the apprentice to perform his duties under the apprenticeship; and,

(2.) If it rescinds the instrument of apprenticeship it may, if it thinks it just so to do, order the whole or any part of the premium paid on the binding of the apprentice to be repaid.

Where an order is made directing an apprentice to perform his duties under the apprenticeship, the court may, from time to time, if satisfied after the expiration of not less than one month from the date of the order that the appren-

tice has failed to comply therewith, order him to be imprisoned for a period not exceeding fourteen days.

Order against surety of apprentice, and power to friend of apprentice to give security.

7. In a proceeding before a court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, if there is any person liable, under the instrument of apprenticeship, for the good conduct of the apprentice, that person may, if the court so direct, be summoned in like manner as if he were the defendant in such proceeding to attend on the hearing of the proceeding (*a*), and the court may, in addition to or in substitution for any order which the court is authorised to make against the apprentice, order the person so summoned to pay damages for any breach of the contract of apprenticeship to an amount not exceeding the limit (if any) to which he is liable under the instrument of apprenticeship.

The court may, if the person so summoned, or any other person is willing to give security to the satisfaction of the court for the performance by the apprentice of his contract of apprenticeship, accept such security instead of or in mitigation of any punishment which it is authorised to inflict upon the apprentice.

(*a*) If the apprentice be under twenty-one years of age, as will almost always be the case, and his father be alive, he will be sure to have signed the indenture, and must in any event be called as curator of his son.

Mode of giving security.

8. A person may give security under this Act in a county court or court of summary jurisdiction by an oral or written acknowledgment in or under the direction of the court of the undertaking or condition by which and the sum for which he is bound, in such manner and form as may be prescribed by any rule for the time being in force, and in any case where security is so given, the court in or under the direction of which it is given may order payment of any sum which may become due in pursuance of such security.

Summary proceedings.

9. Any dispute or matter in respect of which jurisdiction is given by this Act to a court of summary jurisdiction shall be deemed to be a matter on which that court has authority by law to make an order on complaint in pursu-

ance of the Summary Jurisdiction Act, but shall not be deemed to be a criminal proceeding; and all powers by this Act conferred on a court of summary jurisdiction shall be deemed to be in addition to and not in derogation of any powers conferred on it by the Summary Jurisdiction Act, except that a warrant shall not be issued under that Act for apprehending any person other than an apprentice for failing to appear to answer a complaint in any proceeding under this Act, and that an order made by a court of summary jurisdiction under this Act for the payment of any money shall not be enforced by imprisonment except in the manner and under the conditions by this Act provided; and no goods or chattels shall be taken under a distress ordered by a court of summary jurisdiction which might not be taken under an execution issued by a county court.

A court of summary jurisdiction may direct any sum of money, for the payment of which it makes an order under this Act, to be paid by instalments, and may from time to time rescind or vary such order.

Definitions: "Workman:"

10. In this Act, the expression "workman" does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

Set off in case of factory workers.

11. In the case of a child, young person, or woman subject to the provisions of the Factory Acts, 1833 to 1874, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work.

Application to

12. This Act in so far as it relates to apprentices shall apply only to an apprentice to the business of a workman as

defined by this Act upon whose binding either no premium is paid, or the premium (if any) paid does not exceed twenty-five pounds, and to an apprentice bound under the provisions of the Acts relating to the relief of the poor. apprentices.

13. Nothing in this Act shall take away or abridge any local or special jurisdiction touching apprentices. Saving of special jurisdiction, and seamen.

This Act shall not apply to seamen or to apprentices to the sea service.

14. [In Scotland the Court of Summary Jurisdiction is to be the Sheriff Small Debt Court; the Summary Jurisdiction Act is to be the Sheriff Small Debt Act; and surety is to mean cautioner.]

All jurisdictions, powers, and authorities necessary for the purposes of this Act are hereby conferred on Sheriffs in their Ordinary or Small Debt Courts, as the case may be, who shall have full power to make any order on any summons, petition, complaint, or other proceeding under this Act, that any county court or court of summary jurisdiction is empowered to make on any complaint or other proceeding under this Act.

Any decree or order pronounced or made by a Sheriff under this Act shall be enforced in the same manner and under the same conditions in and under which a decree or order pronounced or made by him in his Ordinary or Small Debt Court, as the case may be, is enforced.

ACT OF SEDERUNT

IN RELATION TO

'THE EMPLOYERS AND WORKMEN ACT, 1875.'

29th January 1876.

1. In proceedings under the Act before the Small Debt Court of the Sheriff, the forms set forth in the Schedule hereto annexed, or forms as near thereto as circumstances

permit, shall be used; and all citations, and executions of citation of parties or witnesses, shall be in the form, or as nearly as may be, of those in Schedule A of the Act 1 Vict. c. 41.

2. In so far as the forms in the Schedule annexed hereto shall be inapplicable to the circumstances, the forms contained in Schedule A of the said Act, 1 Vict. c. 41, or as near thereto as circumstances will permit, shall be used.

3. All causes under the said 'Employers and Workmen Act, 1875,' and the proceedings therein, shall be entered in the book mentioned in § 17 of the said statute, 1 Vict. c. 41, in the same way as in other cases under that Act, and the decrees or orders and warrants shall be annexed to the complaint or summons, and signed by the Clerk.

4. No notice shall be required to be given by a defender of any set-off or counter-claim that he may wish to advance at the hearing against the claim of the pursuer.

5. The expenses shall be at the same rates as in the Small Debt Court.

SCHEDULE.

1. *Summons or Complaint.*

(Under 'The Employers and Workmen Act, 1875.')

A. B., Sheriff of the shire of , to Officers of Court, jointly and severally.

Whereas it is humbly complained to me by *C. D.* [*design him*], *pursuer*, against *E. F.* [*design him*], [and *G. H.*, where cautioner is to be called (*design him*)], *defender*, that on the day of 18 the pursuer and the defender entered into a contract [*or* indenture, *as the case may be*] whereby [*here state the nature of the contract or indenture, and the period of its endurance*]; that the defender has neglected and refused to fulfil the same by [*here state the breach of contract complained of*]: Therefore it ought to be decerned and ordained [*here set forth the particular remedy desired*]; [*and add*] or

that the pursuer shall have such other remedy competent under the said statute in respect of the defender's breach of contract as to the Court may seem just, with expenses. Herefore it is my will, that on sight hereof ye lawfully summon the said defender to compear before me or my substitute in the Court House at , upon the day of , at of the clock, to answer at the pursuer's instance in the said matter, with certification in case of failure of being held as confessed; and that ye cite witnesses and havers for both parties to compear at the said place and date to give evidence in the said matter [*here insert warrant to arrest, if desired, in actions with a pecuniary conclusion*]. Given under the hand of the Clerk of Court at , the day of

Signed by Sheriff Clerk.

2. *Decree in Absence.*

Place and Date.

Decerns in absence against the defender, in terms of the special conclusion of the summons above written, and for the sum of of expenses; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.

Signed by Sheriff Clerk.

3. *Order when Caution found.*

Place and Date.

In respect the defender has broken the contract libelled, and that the Court would have awarded to the pursuer the sum of £ of damages, and that the defender has found caution in terms of 'The Employers and Workmen Act, 1875,' and that the pursuer consents, the Court accepts the same in place of the said damages [or the part thereof], and orders that the defender do perform so

much of his contract as yet remains unperformed, and finds him liable [in the remaining sum of of damages and] in the sum of of expenses, and decerns; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.

Signed by Sheriff Clerk.

4. *Bond or Enactment of Caution to be appended to the Complaint and Order.*

At , the day of 18 , in fulfilment of the preceding order, Compeared *G. H.* [*design him*], who hereby judicially binds himself, his heirs, executors, and successors, as cautioners for the defender *E. F.*, that the said defender will perform so much of the contract between the said *E. F.* and *C. D.* as yet remains to be performed; that is to say [*state what yet remains to be performed*]. And the said *G. H.* and the said *E. F.* bind and oblige themselves, conjunctly and severally, to pay to the said *C. D.* the sum of £ in case the said defender fails to perform what he has hereby undertaken to perform.

Signed by the Party, Cautioner, and Sheriff Clerk.

5. *Order on Apprentice.*

Place and Date.

The Sheriff orders that the defender *E. F.* do forthwith perform the duties he has contracted to perform under his indenture to the pursuer, and finds him liable in of expenses, and decerns; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.

Signed by Sheriff Clerk.

6. *Order rescinding Contract of Apprenticeship.*

Place and Date.

The Sheriff adjudges and decerns that the indenture made between the pursuer and the defender *E. F.* be rescinded, and that the defender [*or* pursuer] do pay to the sum of £ , being the whole [*or* a part] of the premium paid on the binding of the defender [*or* pursuer] as apprentice to the pursuer [*or* defender]: Finds the liable in of expenses, and decerns; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.

Signed by Sheriff Clerk.

7. *Warrant of Commitment of Apprentice.*

Place and Date.

The Sheriff having resumed consideration of this case, and having considered the proof adduced, Finds that the defender has failed to comply with the order of the day of : Therefore grants warrant to commit the defender to the prison of for days [*not exceeding fourteen*], and grants warrant to officers of Court and the keeper of said prison accordingly.

Signed by Sheriff Clerk.

8. *Order accepting Caution for performance of Duties.*

Place and Date.

In respect *E. F.*, the defender, has failed to perform his duties under his indenture, and that the Sheriff would have committed him to prison for a period of [*not exceeding fourteen*] days, and in respect that *G. H.* is willing to become cautioner to the amount of £ for the said *C. D.* for the due performance by him of his duties, the Sheriff

directs such caution to be forthwith given instead of the said imprisonment: Finds the defender liable in of expenses, and decerns; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.

Signed by Sheriff Clerk.

9. *Bond or Enactment of Caution for an Apprentice, to be appended to the Complaint.*

At , the day of 18 , in fulfilment of the preceding interlocutor, Compeared *G. H.* [*design him*], who hereby judicially binds himself, his heirs, executors, and successors, as cautioners for the defender *E. F.* [*design him*], that the said *E. F.* will perform the whole duties that yet remain to be performed by him, under the indenture entered into between him and *C. D.*, of date the day of , that is to say [*state what yet remains to be performed*]; and the said G. H. and the said *E. F.* bind and oblige themselves, conjunctly and severally, to pay to the said *C. D.* the sum of £ , in case the said defender fails to perform the duties yet to be performed by him under said indenture.

Signed by the Party, Cautioner, and Sheriff Clerk.

SUMMARY REMOVINGS.

EXCERPT FROM 1 & 2 VICTORIA, CAP. 119.

Summary complaint for removing from premises let for less than a year.

VIII. And whereas it is expedient to diminish the expense and delay with which the process of removing from houses and other heritable subjects, of the rent hereinafter provided, let for any shorter period than a year, in Scotland, is attended; be it enacted, That where houses or other heritable subjects in Scotland are let for any shorter period than a year, at a rent of which the rate shall not exceed thirty pounds per annum, it shall be competent for any person, authorised by law to pursue a removing therefrom (*a*), to present a summary complaint to the Sheriff of the territory (*b*), who shall order it to be served (*c*), and the defender to appear on such day as he may in each case think proper (*d*), in the form or to the effect of Schedule (A.) annexed to this Act.

(*a*) The owner, or his law agent, or the principal tenant who sublet the subjects. In practice a factor is allowed to sue, as in general the subjects would be let by him. Even if a mandate were held necessary it may be allowed to be produced *pendente lite*,—*Shinas* v. *Fordyce*, 1777, 5 Br. Sup. 572.

(*b*) *I.e.*, the territory in which the subjects are situated. But if the defender lives out of the jurisdiction the warrant will require to be indorsed by the Sheriff Clerk of the jurisdiction within which he resides.

(*c*) The warrant is granted by the Sheriff Clerk in his name.

(*d*) It will be found convenient for the warrant to specify a diet and ordain the complainer to give notice of it to the defender of at least forty-eight hours.

Defender may repone

IX. And be it enacted, That if the defender shall fail to appear after being duly cited, the Sheriff shall proceed to

against decree in absence.

determine the cause in the same manner as if the defender had been personally present (*a*): Provided always, that where the decree shall have been pronounced in absence, and shall not have been carried into execution, the defender may present a petition to the Sheriff for a further hearing of the cause, with evidence of intimation thereof having been made to the opposite party written thereon (*b*); and the Sheriff, if he shall see cause (*c*), and upon payment by the defender to the complainer of such expenses as the Sheriff may judge reasonable (*d*), may recall his decree, and proceed to hear and determine the cause as on the original complaint without delay; and provided also, that where decree shall be pronounced in absence, the Sheriff may give such order for preservation of the goods and effects of the defender as he may deem proper.

(*a*) In practice he is held *pro confesso*, as in the Small Debt Court, which is found to work quite satisfactorily. The warrant granted and citation given so provide. But it will be open to the Sheriff, if he think it expedient, to hear the evidence.

(*b*) These are rare: I never saw one. It will be observed that there is no sist or stay of execution as under the Small Debt Act; and therefore the warrant will probably have been executed before the petition comes up. To meet any emergency, however, a Form, No. 33, will be found at p. 143 among the Supplementary Forms. The intimation might, it is thought, be either verbal in presence of a witness, or by registered letter as in the Forms in the notes to Nos. 2 and 3 of the Small Debt Act, Schedule A., at pp. 97 and 98.

(*c*) Reponing is not a matter of right, as under the Small Debt Act, but is, like a reponing under subsection 2, of section 14 of the Sheriff Courts Act of 1876, a question of discretion. If, for example, the petitioner was ill, or his absence due to pardonable error, the case might be opened up.

(*d*) As these are of the nature of an amand, it will generally be proper to make their payment a condition precedent of further procedure.

Warrant to cite witnesses, and provision as to fees.

X. And be it enacted, That the complaint or copy thereof served on the defender shall be a sufficient warrant to any Sheriff officer to cite witnesses or havers for either party to appear on the day of trial and give evidence in such summary cases of removing; and the fees allowed to the clerk or officers of court on such complaint and proceedings shall be the same as those allowed on summonses and similar proceedings in Small Debt causes (*a*) in Sheriff Courts in Scotland under an Act passed during the

last session of Parliament, intituled 'An Act for the more 'effectual Recovery of Small Debts in Sheriff Courts, and 'for regulating the Establishment of Circuit Courts for the 'Trial of Small Debt Causes by the Sheriffs in Scotland:' Provided always, that the travelling expenses of officers and their assistants under the said recited Act and this Act shall not be allowed for more than the distance from the residence of the officer employed to the place of execution or service, in case such distance shall be less than from the court house to such place, and the Sheriff shall have power to modify such expenses in case the officer residing nearest to the place of execution or service shall not be employed; and provided also, that such travelling expenses shall not be allowed against an opposite party for a greater distance than twelve miles. 7 W. 4, & 1 Vict. c. 41.

(*a*) See section XXXII. and notes, pp. 86-88.

XI. And be it enacted, That the citation and farther procedure (*a*) in such summary removings shall, in so far as not provided for by this Act, be the same as those established by the said recited Act for the trial of Small Debt causes in Sheriff Courts; and where decree of removing is pronounced it shall be in the form or to the effect of the said (*b*) Schedule (A.) and shall have the full force of a decreet of removing and warrant of ejection (*c*), and the judgments to be pronounced in such summary actions of removing shall be final, and not subject to review, either in the Circuit Court of Justiciary or in the Court of Session. Citation and farther procedure in removings to be the same as provided for Small Debt causes. Judgments to be final.

(*a*) See sections III., XII., XIII., and XIV.

(*b*) Not of the Small Debt Act, but of this Act.

(*c*) The Sheriff decerns and ordains the party to remove himself; and if he fails to remove himself by the appointed time, the officers of Court can at once put in force the warrant of ejection, that is, the warrant in the decree granted to them to eject the party.

XII. And be it enacted, That the Sheriff may, of consent of parties, or where the ends of justice require it, adjourn the further hearing of or procedure in any summary process of removing raised under the authority of this Act, and Sheriff may adjourn the cause.

he may likewise order written answers to be given in to the complaint; and all such orders shall be final, without being subject to appeal or advocation: Provided always, that the Sheriff shall, in all such cases where the defences cannot be instantly verified, ordain the defender to find caution for violent profits (*a*).

(*a*) If the pursuer has anything to prove there is no room for this order,—*St Clare* v. *Grant*, 1687, Mor. 13893; *Oliver* v. *Weir's Trs.*, 21 May 1870, 8 M. 786; 42 J. 444. It is to be pronounced only where decree would *de plano* be granted but for the answers that the defender wishes to lodge. Violent profits, said Lord President Inglis, "embrace not only all profits which the pursuers could make, if they were in possession, but also all damages which the subject may receive at the hands of the defender,"—*Gardner* v. *Beresford's Trs.*, 17 July 1877, 4 R. 1091; 14 S. L. R. 590.

Where defender has found caution he may give in written answers to complaint.

XIII. And be it further enacted, That in all cases where the defender has found caution he shall be allowed to give in written answers to the complaint; and in all cases where written answers shall be ordered such cases shall thereafter be conducted, as nearly as may be, according to the forms in use in ordinary processes of removing, and the judgment of the Sheriff therein shall be subject to review in common form (*a*).

(*a*) This takes the case out of the Small Debt rules.

Members of College of Justice not exempt.

XIV. And be it enacted, That no person shall be exempt from the jurisdiction of the Sheriff in any process of removing raised under the authority of this Act, on account of privilege, or being a member of the College of Justice or otherwise (*a*).

(*a*) See section XXXV. of Small Debt Act and note (*a*) thereto, p. 90.

SCHEDULE (A.)

1. *Form of Summary Complaint.*

Unto the Honourable the Sheriff of the County of

Complains *A. B.* [*name and design the Complainer*] against *C. D.* [*name and design the Defender*], that the complainer [or

his author, *as the case may be,*] let to the said defender [*or* his author, *as the case may be,*] a dwelling-house, garden, and pertinents [*or other subjects, as the case may be,*] situate in for the period from to that the said defender is bound to remove (*a*) from the said subjects at the date last mentioned, and it is necessary to obtain decree of removing against him, [*or, as the case may be,* refuses or delays to remove therefrom, although the period of his lease has expired (*b*):] Therefore decreet ought to be granted for removing and ejecting the said defender, his family, sub-tenants, cottars, and dependants, with their goods and gear, furth and from the said subjects, [*here insert the date at which the removal or ejection is sought for, as the case may be,*] that the complainer or others in his right may then enter to and possess the same. [*If expenses are sought, add,* and the said defender ought to be found liable in expense of process and dues of extract.]

[*Signature of the Party or Agent.*]

(*a*) If the house is in burgh and let for a termly period of less than four months, a notice of removal equal to one-third of the period of the lease must, in the absence of express stipulation, be given. See on this point the Form of Notice, No. 32, in the Supplementary Forms, and note (*a*) thereto, p. 143.

(*b*) The provisions of the Statute are in much more frequent use for this latter purpose, as it is common in small urban subjects to stipulate that if the tenant shall fall in arrear, his lease shall thereon terminate. This compulsitor is very useful; but it is proper that sufficient notice should be given to the tenant that if his rent is not paid by a specified day, a summary ejection—as in such circumstances it is generally termed—will be applied for. The amount of the arrears is a question for the Small Debt Court. The form of the complaint may conveniently be varied to the following effect from the point where the duration of the lease is specified—viz., *Ut supra* . . . for the period from 11th July 1882 to 11th August following, and so on monthly thereafter; and that the Defender is in arrears with his rent, and refuses or delays to remove from the premises, although the period of his lease has expired; Therefore decreet ought to be granted for removing and ejecting the said Defender and his family, with their goods and gear, furth and from the said house on twentieth November 1882, that the Complainer or others in his right may then enter to and possess the same; and the said Defender ought to be found liable in expense of process and dues of extract.

2. *Form of Warrant thereon.*

The Sheriff grants warrant to cite the said defender to compear personally before him at the court house [*or else-*

where, as the case may be,] upon the [*insert the day of the month and hour, if need be,*] to answer the foregoing complaint, under certification of being held as confessed; ordains such citation to be made at least [*state the period* (*a*) *which the Sheriff may fix to intervene betwixt the citation and diet of compearance,*] previous to the said diet of compearance; and grants warrant to cite witnesses for both parties to appear, time and place foresaid, to give evidence in the said matter, under the pains of law. Given under the hand of the Clerk of Court at the day of

Sheriff Clerk.

(*a*) See note (*d*) to sec. 8 *supra*, p. 129.

3. *Form of Citation for Defender.*

C. D., defender above designed, you are hereby summoned to appear and answer before the Sheriff in the matter complained of, and that at [*here specify time and place*], under certification of being held as confessed.

This notice (*a*) is served upon the day of by me,

Sheriff Officer.

(*a*) Notice may be given under the Citation Amendment Act of 1882; and a Form will be found under No. 2 of Schedule A. of the Small Debt Act, p. 97.

4. *Form of Execution of Citation.*

Upon the day of I duly summoned the above-designed *C. D.*, defender, to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification above set forth. This I did by delivering a copy of the above complaint, with a citation thereto annexed, to the said defender personally [*or otherwise, as the case may be.*] (*a*)

Sheriff Officer.

(*a*) For the proper Form and regulations applicable if the citation be given under the Citation Amendment Act of 1882, see No. 3 of Schedule A. of the Small Debt Act and notes, pp. 97 and 98.

5. *Form of Decreet and Warrant of Ejection.*

At the day of the which day the Sheriff [in absence of the defender, *or* having heard parties, *as the case may be,*] decerns and grants warrant for removing and ejecting the said *C. D.*, defender, and others mentioned in the complaint, from the subjects therein specified, such ejection not being sooner (*a*) than [*here insert the time appointed for removal, and whether after a charge on such inducicæ as may be deemed proper, or instantly*] finds the said defender liable in expenses [*or otherwise, as the case may be*], and decerns.

[*Sheriff's Signature.*]

Note.—The whole of the above to be in the same paper.

(*a*) The days of grace allowed may be varied to suit the circumstances of the case, and the need the pursuer has for the house, and the facilities open to the defender to find another. In towns noon, forty-eight hours after the decree, is frequently selected. If any of the defender's family are ill with an infectious disease, it would not be proper to order the family to remove till the ailing persons are certified to be able to be moved with safety to themselves and to others.

SUPPLEMENTARY FORMS.

1. *Appeal taken in open Court.*

Glasgow, 11th April 1883. I appeal [on behalf of the defender] against the decree of the Sheriff on the within complaint, finding me [or him] liable in payment to the pursuer thereof of the sum of two pounds five shillings with four shillings and sevenpence of expenses, to the next Circuit Court of Justiciary to be held at Glasgow for hearing appeals in civil causes, and that for reasons to be stated at the bar of said Court.

A. B.

2. *Appeal minuted on separate paper.*

Glasgow, 17th April 1883. I appeal against the decree of the Sheriff of the County of Lanark, which was pronounced on 11th April 1883, in the complaint against me at the instance of John Smith, grocer, Glasgow, for payment of the sum of two pounds five shillings for goods alleged to have been supplied to me, and which found me liable in payment of said sum to the pursuer, with four shillings and sixpence of expenses, to the next, &c., *ut supra.*

3. *Note of Appeal by Defender.*

Unto the Right Honourable the Lord Justice General, Lord Justice Clerk, and Lords Commissioners of Justiciary, or such of them as shall preside at the next Circuit Court of Justiciary to be held at Glasgow,

The Appeal of

John Imrie, ironmonger, Bell Street, Partick, *appellant;*

against

Hugh Mason, tinsmith, Castle Street, Glasgow, *respondent,*

Humbly Sheweth,

That on 5th April 1883 the respondent took out a summons against the appellant to appear in the Sheriff Small Debt Court at Glasgow on 11th April 1883 to answer to a claim for payment of the sum of £3 for certain goods alleged to have been sold to the appellant.

On the case being called in Court before Mr Sheriff Erskine Murray [*narrate concisely the procedure that took place and the grounds on which the judgment is complained of*].

The appellant conceives himself aggrieved by the said decree, and now complains thereof, and seeks relief against the same, for the following reasons, and for others to be stated at the hearing hereof:—

Firstly, [*state the grounds of complaint articulately and concisely without argument*].

May it therefore please your Lordships to Sustain the appeal; to Recall the judgment or decree complained of; to Assoilzie the appellant from the conclusions of the said summons; and to Find the respondent liable in expenses; or to Do further or otherwise, as to your Lordships shall seem proper.

According to Justice.

4. *Prayer in Note of Appeal by Pursuer.*

May it therefore please your Lordships to Sustain the appeal; to Recall or Alter the decree complained of; to Grant decree for the sum concluded for in said complaint; or otherwise to Remit the cause to the said Sheriff, with instructions to him to grant decree for the sum sued for with expenses, or to hear the cause; and to Find the respondent liable in expenses in both Courts; or to Do further or otherwise, as to your Lordships shall seem proper.

5. *Docquet on appeal.*

This Appeal lodged, consignation made, and caution found in terms of law. A. B., Sheriff Clerk.

Date.

See under section XXXI., note (*f*).

6. *Acceptance of Service of Appeal.*

I accept service of the foregoing Appeal on behalf of the respondent, Charles Wilson, and dispense with more formal intimation thereof.

A. B.,
36 Bath Road, Glasgow,
Pro^r. for respondent.

7. *Execution of Service of Appeal.*

Upon the eighteenth day of April One thousand eight hundred and eighty-three years I duly served the above Note of Appeal upon Charles Wilson, respondent, therein designed. This I did by delivering a full copy thereof, having a just copy of intimation thereon, signed by me, to the said Charles Wilson, personally, [*or*, to his procurator, A. B., 36 Bath Road, Glasgow,] in presence of Robert Johnston, residing in Cage Street, Glasgow, witness hereto with me subscribing.

Robert Johnston, Witness. John Thomas, Sheriff Officer.

8. *Execution of Intimation of Appeal under Citation Amendment Act.*

This Note of Appeal intimated by me John Thomas, Sheriff Officer, to Charles Wilson, respondent, by posting (*a*) on the eighteenth day of April One thousand eight hundred and eighty-four years, between the hours of three and four o'clock afternoon, at the General Post Office of Glasgow, a copy of the same to him, with intimation subjoined, in a registered letter addressed as follows—viz., "Mr Charles Wilson, purveyor, 481 Denny Road, Glasgow."

John Thomas, Sheriff Officer.

(*a*) The post office receipt for the registered letter must accompany the execution.

9. *Bond of Caution in Appeal.*

I, John Smith, architect, Hill Street, Partick, do hereby judicially enact, and bind and oblige myself, and my heirs, executors, and successors, whomsoever, as cautioners and sureties acted in the Sheriff Court Books of Lanarkshire at Glasgow, for David Jones, measurer, Oporto Street, Glasgow, that he shall answer to, and abide by, the judgment to be given and pronounced by the Lord Justice General, Lord Justice Clerk, and Lords Commissioners of Justiciary, or any of them, in the next Circuit Court of Justiciary (for hearing appeals in civil causes) to be holden by them, or by any one or more of their number, at Glasgow in the month of May next, on hearing the appeal taken by him, the said David Jones, against an interlocutor or sentence, pronounced by the Sheriff Substitute of said shire, in the action depending or lately depending in the Sheriff Small Debt Court of said shire at Glasgow, at the instance of James Gray, chemist, Thomson Street, Glasgow, against him, which interlocutor or sentence is dated the first day of April one thousand eight hundred and eighty years; and I also bind and oblige myself and my foresaids, as aforesaid, that the said David Jones shall make payment to the said James Gray, or to whomsoever the same may be awarded, of whatever sum the said Lords, or any of them, shall modify, award, or decern for, in name of expenses, in case of wrongous appealing: and I consent to the registration hereof in the said Sheriff Court Books or others competent for preservation, and that Letters of Horning on six days' charge, and all other legal execution, may hereon pass in form as effeirs and thereto constitute my procurators: In witness whereof, &c.

10. *Certificate of Sufficiency of Cautioner.*

I, Arnold Schofield, one of her Majesty's Justices of the Peace for the county of Lanark, hereby certify that the cautioner, David Wilkie, within designed, is, to my personal knowledge, habit and repute responsible for the amount and obligation therein undertaken.

Arnold Schofield, J.P.

11. *Counterclaim.*

Counterclaim
in the Action,
James Smith, portioner, Forsyth Street, Glasgow,
against
John Brown, gardener, Teviot Row, Glasgow.

The pursuer having let to the defender certain garden ground in Teviot Row for a year from Whitsunday 1882 at the rent of £10, and having in or about the month of July following deprived him of the use of a portion, amounting to about one-third, of said ground, and having caused the shrubs, plants, flowers, and vegetables therein to be uprooted, carried off, or destroyed by his servants, or others acting on his behalf,

To loss and damage sustained by the defender . . . . £12.

12. *Notice of Counterclaim.*

James Smith, pursuer, above designed, notice is hereby given to you of the above counterclaim for damages for breach of contract intended to be pleaded against you by John Brown, defender, in the Small Debt action to which the said defender was summoned to appear before the Sheriff at Glas-

gow upon the tenth day of January One thousand eight hundred and eighty-four years at ten of the clock forenoon.

This notice [with a copy of the said counterclaim (*a*)] served upon the eighth day of January One thousand eight hundred and eighty-four years by me,

John Thomas, Sheriff Officer.

(*a*) These words, though they may with advantage be inserted, and generally are, are not essential,—see section III., note (*h*). For the Form of Execution, see Schedule A. No. 4, p. 98.

13. *Intimation of Counterclaim under Citation Amendment Act of* 1882.

James Smith, . . . *ut supra* . . . clock. This notice [with a copy of the said Counterclaim (*a*)] intimated upon the seventh (*b*) day of January One thousand eight hundred and eighty-four years between the hours of three and four o'clock afternoon, by me,

John Thomas, Sheriff Officer.

(*a*) See note (*a*) to preceding form.

(*b*) The intimation takes effect from twenty-four hours after the time of posting; and therefore to let the notice given be one free day before the tenth, it must be given on the seventh.

14. *Decrees in ordinary actions.*

See section XVII., note (*c*).

15. *Decrees when Counterclaims made* (*a*).

Sustains pursuer's claim to the extent of six pounds, and defender's counterclaim to the extent of four pounds, and Decerns against defender for the balance of two pounds, with 10s. 6d. of expenses.

Sustains pursuer's claim to the extent of three pounds, and the counterclaim to a greater extent, and assoilzies defender, with 5s. 3d. of expenses, for which Decerns,—reserving action, at his instance, against pursuer for any balance of his counterclaim beyond three pounds.

Assoilzies defender from pursuer's claim with 7s. 6d. of expenses, for which Decerns, reserving action for his counterclaim.

Decerns against defender for six pounds, with 8s. of expenses,—reserving action for his counterclaim.

(*a*) See p. 30.

16. *Interlocutors Remitting the cause.*

Continues the cause till this day fortnight [*or, sine die*], and Remits to Mr Robert Renfrew, cabinet-maker, Glasgow, to examine the articles of furniture in dispute [and which are marked with a cross on the account sued on,] in presence of parties, and to report to the Court as to the alleged overcharges in price.

Remits to any of the partners of Smith & Jones, brick-builders, Glasgow, to examine the building in question, in presence of parties, and hear them, and report to the Court what abatement, if any, should be made on the account sued on, in respect of alleged insufficiency of workmanship.

17. *Decrees in Sisted actions* (*a*).

Dismisses defender's sist, with 3s. 6d. of additional expenses, and adheres to the decree in absence of 9th January 1884.

Sustains defender's sist, Recalls decree in absence of 1st February 1882, and of new Decerns against defender for one pound, with 11s. 4d. of expenses.

Sustains pursuer's sist, Recalls decree of absolvitor of 4th May 1883, and Decerns against defender for 17s. 6d., with 2s. 3d. of expenses, and authorises the Clerk of Court to pay over the consigned money to pursuer.

Dismisses sist.

(*a*) See note (*p*), pp. 57 and 58.

18. *Docquet at end of Roll.*

The Sheriff pronounces judgment in each of the foregoing cases as marked after the parties' names, and authorises the Clerk of Court to issue warrants for recovery of the sums decerned for, with expenses in terms of the Statute; but declaring that if any of those to whom the indulgence of paying by instalments is given shall allow any instalment to remain unpaid until the term of payment of the next instalment be come and by-gone, then the indulgence of paying by instalments shall cease, and in that event Decerns and Ordains instant Execution to pass, after a charge of ten free days, for the whole sums decerned for and unpaid, and Decerns; but excepting from this declaration any decree for payment of future aliment by instalments.

19. *Extract Instalment Decree.*

At Glasgow, the third day of March One thousand eight hundred and eighty-four years, the Sheriff of the shire of Lanark finds the within designed Charles Dickson, defender, liable to the also within designed Hugh Smith, pursuer, in the sum of five pounds with ten shillings of expenses, payable by instalments of five shillings per week, and commencing payment of the first instalment upon the eighth day of March One thousand eight hundred and eighty-four years, and continuing thereafter in the regular payment of said instalments till the whole of said sums be paid up; and Decerns and Ordains instant Execution by arrestment, and also Execution to pass hereon by poinding and sale, and imprisonment, if the same be competent, after an elapse of ten free days from the said last-mentioned date for the first instalment, and after an elapse of the same period from the respective terms of payment for all the subsequent instalments: but declaring that if the defender shall allow any instalment to remain unpaid until the term of payment of the next instalment (*a*) be come and by-gone, then the indulgence of paying by instalments shall cease; and in that event Ordains Execution to pass hereon by the diligence aforesaid, after a charge of ten free days, for the whole sums decerned for and unpaid.

(*a*) See note (*c*), p. 61.

20. *Extract Decree in Sequestration* (*a*).

[After ordinary decree, Schedule A., No. 7, p. 101, *add,*] And further, the Sheriff grants warrant to any officer of Court forthwith to sell, by public roup, as much of the sequestrated effects as will satisfy and pay the said rent, with the expenses: Directs the roup to take place on the premises, if situated in a town or village; or if not, Grants Warrant to carry the sequestrated effects to the cross, or most public place of the nearest town or village, there to be sold; and the sale in either case to be publicly proclaimed two hours at least previous thereto, and to be reported within eight days thereafter.

(*a*) See note (*d*), p. 106.

21. *Indorsation.*

Indorsed in terms of the Statute, A. B., Sheriff Clerk of &c., *or*, Indorsed by me, Sheriff Clerk of &c., in terms of the Statute, A. B.

22. *Execution of Lockfast doors* (*a*).

Upon the seventeenth day of January, One thousand eight hundred and eighty-four years, I, John Thomas, Sheriff Officer, passed to the premises within mentioned possessed by the defender, William Jones, at 241 Kent Terrace, Partick, for the purpose of carrying the within warrant into all due and lawful effect, but was prevented in consequence of the doors of said premises being shut and lockfast. Upon each of said doors I gave six audible knocks as use is, in presence of John Thomson, residing in 23 Williamson Street, Partick, witness hereto with me subscribing.

(*a*) Warrant can be granted on the officer's execution without any minute. For the Form of Minute if used, see No. 23 *infra.*

23. *Minute for Warrant to break open* (*a*).

In respect the within deliverance is unable to be put in force owing to the defender's doors being shut and lockfast, warrant of the Court is respectfully craved for authority to break open the same for the purpose of putting said deliverance in force, and thereafter to secure the same to prevent dilapidation.

(*a*) The House of Lords held that, though power to grant the warrant craved is not expressly conferred by the Act, the Sheriff possesses it, *Scott* v. *Lethem*, 23 May 1846, 5 Bell App. 126; 18 J. 421.

24. *Minute for warrant to carry back, Sequestrate,* [*and Store*].

In respect the defender, the within designed Thomas Wilson, has removed the whole of the goods and effects which were situated in the house 7 Taylor Street, also within mentioned, and subject to the pursuer's right of hypothec for the rent thereof due at the term of Martinmas last, to a house which he now occupies at 541 Sauchiehall Street, warrant is respectfully craved to officers of Court to search for and carry back from 541 Sauchiehall Street said goods and effects, consisting of a kitchen table, a bed, sofa, and six chairs, to the said first-mentioned house at 7 Taylor Street, there to be inventoried and sequestrated and secured in terms of the within warrant; [and warrant is further respectfully craved thereafter to remove the said furniture and effects to an empty house in No. 22 Whitefield Lane, or such other place as the Court shall approve, there to await the further orders of Court, the defender's lease of the said house in Taylor Street having expired.]

25. *Minute for Warrant to carry back Sequestrated Effects.*

In respect the defender has removed the effects mentioned in the within inventory from the premises in question at 68 Montague Road, to premises situated at 42 Coburg Street, Partick, warrant is respectfully craved to search for and carry back said effects from 42 Coburg Street aforesaid to the said premises at 68 Montague Road, where they were inventoried, there to be sold in terms of the within warrant.

26. *Minute for warrant to Sell forthwith.*

In respect that certain of the articles, in regard to which warrant to inven-

tory and secure [and store] was granted, consist of fruit, fish, and other articles of a perishable nature, warrant is respectfully craved for their immediate sale at the premises in question, and to consign the amount realised, under deduction of the expenses of sale, with the Clerk of Court.

27. *Minute of consent to Summary Trial.*

The parties, having agreed that the cause should be tried summarily, in terms of the 23d section of the Act 16 & 17 Vict. cap. 80, crave the Court to interpone its authority hereto, and dispose of the cause accordingly.

28. *Intimation of Recall of Sequestration.*

A. B. (*design him as he designs himself in the summons*), take notice, That the sequestration led by you, in the action at your instance against C. D. (*design him as designed in the summons*), on the seventh day of March One thousand eight hundred and eighty-four years, for the sum of ten pounds of rent and expenses, has, by virtue of a warrant of the Sheriff of the shire of Lanark, given under the hand of the Clerk of Court at Glasgow, on the eighth day of March foresaid, been recalled in respect that the said C. D. has made consignation in terms of the Statute with the said Sheriff Clerk, who has duly certified the same. This notice served on the tenth day of March One thousand eight hundred and eighty-four years by me, [*or*,—if done under the Citation Amendment Act,—This notice intimated upon the tenth day of March One thousand eight hundred and eighty-four years, between the hours of three and four o'clock afternoon, by me,]

John Thomas, Sheriff Officer.

29. *Intimation of Re-enrolment.*

John Smith, glazier, 48 Denny Row, Glasgow, Take notice that the Complaint at the instance of William Jones, Doctor of Medicine, 31 James Street, Glasgow, against you, presently depending in the Sheriff Small Debt Court at Glasgow, has been re-enrolled for Wednesday next, eighteenth January One thousand eight hundred and eighty-three years, and will be called in the Sheriff Court House, No. 109 Brunswick Street, Glasgow, on said day, at ten o'clock forenoon, under certification. This notice intimated on the eleventh day of January foresaid, between the hours of one and two o'clock afternoon, by me,

John Thomas, Sheriff Officer.

30. *Execution of Intimation of Re-enrolment by service.*

Upon the sixth day of March One thousand eight hundred and eighty-four years, I, John Thomas, Sheriff Officer, intimated to William Murray, joiner, 27 Henley Road, Glasgow, that the Small Debt complaint at his instance against Robert Jones, contractor, 44 Oxford Lane, Glasgow, has been put on the roll and will be called upon the twelfth day of said month at the Sheriff Court House, No. 109 Brunswick Street, Glasgow, at ten of the clock, forenoon, with certification. This I did by delivering a just copy of intimation, signed by me, to the said William Murray, personally, at Henley Road, aforesaid.

John Thomas, Sheriff Officer.

31. *Execution of Intimation of Re-enrolment under Citation Amendment Act.*

Upon the fifth (*a*) day &c. . . . *ut supra*, No. 30, . . . with certification. This I did by posting on the said fifth day of March between the hours of four and five o'clock afternoon, at the General Post Office of Glasgow, a just copy of intimation signed by me, to him, in a registered letter addressed as follows—viz., Mr William Murray, joiner, 27 Henley Road, Glasgow.

Or, Notice of re-enrolment of the complaint at the instance of William Murray, joiner, 27 Henley Road, Glasgow, against Robert Jones, contractor, 44 Oxford Lane, Glasgow, intimated by me to the said William Murray, pursuer, by posting on the fifth (*a*) day of March One thousand eight hundred and eighty-four years, between &c., *ut supra*.

(*a*) The intimation takes effect twenty-four hours after the time of posting. The receipt for the registered letter must accompany the execution.

32. *Notice of Removal* (*a*).

John Smith, porter, 45 Gordon Lane, Glasgow.

Take notice that [in the event of your failing to pay to me the rent presently owing by you for said premises, amounting to the sum of eighteen shillings and sixpence, on or before Monday next the twentieth instant] you are required to remove from said premises at the [end of this current month] twenty-eighth day of January Eighteen hundred and eighty-four.

16 January 1884. William Jones,
82 Mill Street, Partick.

(*a*) If the period of let does not exceed four months, and the house is in burgh, "Notice of removal therefrom shall, in the absence of express stipulation, be given as many days before the date of ish as shall be equivalent to at least one-third of the full period of the endurance of the lease,"—44 & 45 Vict. cap. 39, sec. 4. The notice may be given by registered letter, signed by the party entitled to give notice, or his factor, or law agent, posted in time to be received on or prior to the last date at which notice must be given. If therefore the premises be let by the month the notice must be received on the 20th at latest. The words within brackets are suggested to meet the case of the ejection being intended to enforce payment of the rent. Notice may also be given by a Sheriff Officer in common form. But the important matter to bear in mind is that a notice to remove at an undefined date is not an effectual compliance with the Act. The notice must be to remove at a specified date. If the let is for a broken, and not a termly, period, notice will probably not be needed.

33. *Petition for Reponing.*

Unto the Sheriff of, &c.
The Petition of
William Wilson, tailor, 2 May Street, Glasgow,

Humbly Sheweth,

That on 18th December 1883, James Ritson, hosier, 301 Scarlet Street, Hillhead, obtained decree and warrant for removing and ejecting the petitioner and his family, with their goods and gear, furth and from 2 May Street

aforesaid, by 20th December, at twelve o'clock noon, and finding him liable in four shillings and sevenpence of expenses. That said decree and warrant was granted in absence of the petitioner, and he is desirous to have the cause heard, and gave intimation hereof to the said James Ritson.

May it therefore please your Lordship to Recall the said Decree, and Hear and Determine the cause.

According to Justice.

34. *Sist of Decree in Absence.*

Francis William Clark, Esquire, Advocate, Sheriff of the shire of Lanark, To Officers of Court and other legal Executors hereof (*a*), jointly and severally:—Whereas it is humbly meant and shown to me, by David Watson, tailor, Angus Road, Glasgow, that on the third day of March Eighteen hundred and eighty-four years, William Robertson, cutler, Anson Street, Glasgow, obtained decreet and sentence before me in an action raised under the Small Debt statute, decerning and ordaining the complainer to make payment to him of the sum of ten pounds, with five shillings and fourpence of expenses: That said decree was pronounced in absence of the complainer, and as he is desirous to have the cause re-heard in terms of the statute, and has accordingly consigned the said sum of expenses decerned for, and the further sum of ten shillings to meet further expenses: therefore all execution on said decree is hereby sisted till the diet of compearance after mentioned, or to any subsequent Court day to which the cause may be adjourned; and my will further is, that on sight hereof ye lawfully summon the said William Robertson to compear before me, or my Substitute, in the Court House at No. 109 Brunswick Street, Glasgow, upon the twentieth day of March Eighteen hundred and eighty-four years, at ten of the clock forenoon, in order that the said cause may be re-heard in terms of the Statute: and also that ye cite witnesses and havers for both parties to compear at the said place and date to give evidence in the said matter.

Given under the hand of the Clerk of Court, at Glasgow, the thirteenth day of March Eighteen hundred and eighty-four years.

John Boyle, Depute Sheriff Clerk.

(*a*) The Act does not provide any form for a sist; and the citation can be made by any enrolled law agent under the Citation Amendment Act of 1882.

35. *Application for hearing at different Court.*

See note (*e*), p. 70.

36. *Deliverance thereon.*

See note (*f*), p. 70.

37. *Indorsations of Warrants and Decrees.*

See notes (*e*), p. 41; (*i*), p. 46; (*b*), p. 50; and (*b*), p. 62.

JUSTICE OF PEACE SMALL DEBT ACTS.

6 GEORGE IV. CAP. 48.

An Act to alter and amend an Act passed in the Thirty-ninth and Fortieth Year of King George the Third, for the Recovery of Small Debts in Scotland.—[22d June 1825.]

WHEREAS the regulations introduced by the Act made in the thirty-ninth and fortieth years of his late Majesty (*a*), intituled *An Act for the more easy and expeditious Recovery of Small Debts, and determining small Causes, in that part of Great Britain called Scotland,* have been found useful and beneficial to the public; and it is expedient that the said Act should be altered and amended, and that certain other and further regulations which experience has suggested for the improvement thereof should be introduced: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the first day of January next the said last-mentioned Act shall be and the same is hereby repealed, except as to such causes and complaints as may be brought under the authority of the said last-mentioned Act before the said first day of January next, and then depending; all which causes and complaints shall be

carried on to a conclusion, according to the rules prescribed by the said last-mentioned Act, notwithstanding this Act (*b*).

(*a*) See as to this and prior legislation § 7, p. 3.

(*b*) This whole clause is repealed by the Statute Law Revision Act of 1873,—36 & 37 Vict. cap. 91.

Justices to hear and determine causes on plaints not exceeding £5.

2. And be it enacted, That from and after the first day of January next (which is hereby declared to be the commencement of this Act), it shall be lawful and competent for any two or more of his Majesty's Justices of the Peace, in that part of Great Britain called Scotland, within their respective counties or stewartries (*a*), to hear, try, and determine, as shall appear to them agreeable to equity and good conscience (*b*), all causes and complaints brought before them concerning the recovery of debts, or the making effectual any demand (*c*), and that in a summary way, as more particularly hereinafter mentioned (*d*): Provided always, that the debt or demand shall not exceed the value of five pounds (*e*) sterling, exclusive of expenses.

(*a*) The county of Kirkcudbright is termed "Stewartry," being under the jurisdiction of a Steward. This was the title in use to be given to a magistrate of Crown lands; and on the forfeiture to the Crown of the extensive lands of the Balliol and Comyn families in that county, a Crown magistrate was put over them.

(*b*) In *Flowerdew* v. *Bathie*, 4 July 1850, 12 D. 1178; 22 J. 524, Lord Cockburn interpreted these words as meaning that the Justices "are not to lose their sense in legal punctilios, but to decide like rational men." It is not easy to define precisely what is meant by the phrase; but it is certain that the Legislature did not mean that the Justices were wilfully to disregard the ordinary rules and principles of law, for where that has been done their decisions have been on various occasions set aside. The most important general consideration for Courts of Law is uniformity; where it ends injustice begins. If a party were in one Court to lose a claim which he made, and in another Court to be held liable for a claim made against him on similar grounds, it is obvious that no one would be safe. All business is carried on on the understanding that, as far as possible, the same rules will always be applied.

The phraseology used by the Legislature cannot therefore mean that the Justices are to *make* law where law has already been made. In general their Clerk will be able to tell them whether the point is open, or is foreclosed by decision or rule of law. But though the principle of law may have been settled, few cases are without questions of construction of evidence of more or less difficulty. In such cases, therefore, and in all cases where the point of law is not regulated by statute or authority, the Justices must decide in

accordance with what they conscientiously believe to be reasonable and fair in the circumstances of the case. No Court has a different or a higher rule.

(*c*) In construing these important words it must be kept in view that a Justice of Peace Small Debt Court is a purely statutory tribunal, and can therefore exercise no power which is not expressly given it by the Legislature. See, as to the difference between it and the Sheriff Small Debt Court in this respect, § 13, p. 6.

Without attempting to enumerate or define the cases competent and incompetent, some may be mentioned.

It is competent to claim in the Justice of Peace Small Debt Court to the amount of £5 for payment of an account, or bill, or hire; for damages for breach of any contract, or on account of any injury, or slander, or for loss incurred through professional misconduct,—*Turnbull* v. *Brown*, 14 Feb. 1801, F. C., or occasioned by a riot,—3 Geo. IV. cap. 33, sec. 10; for damages for wrongous apprehension,—*Fyfe* v. *Laing*, 8 Feb. 1823, 2 S. 197; for rent of any heritable subject, if the title is not in dispute,—*Thomson* v. *Boyd*, 25 Feb. 1824, 2 S. 735; and for payment of an annuity,—*Robertson* v. *Finlay*, 21 Nov. 1849, 22 J. 12.

On the other hand, a claim is not competent before the Justices in their Small Debt Court where it brings any heritable right in question; or depends upon the validity of a will or a marriage contract; or is for any gaming debt, or for any spirituous liquors,—section 25 *infra*. Nor where the claim is against a party for something done under the authority of a Sheriff's warrant,—*Brownlee* v. *Paterson*, 12 Feb. 1806, Hume 254. It is not competent to sue for the expenses of a previous case,—*Pollock* v. *Clark*, 12 Nov. 1829, F. C., 8 S. 7, and *Miller* v. *M'Callum*, 14 Nov. 1840, 3 D. 67, 13 J. 25; nor for those incurred in another Court,—*Ledgerwood* v. *M'Kenna*, 18 Dec. 1868, 7 M. 261, 41 J. 159. The Clerk of the Justices cannot competently sue an action before them,—*Campbell* v. *M'Cowan*, 10 July 1824, 3 S. 245; nor can he appear as agent for a party,—*Smith* v. *Robertson*, 27 June 1827, 5 S. 848. It was held in *M'Connell* v. *Scott*, 21 Nov. 1840, 3 D. 128, 13 J. 36, that as the Pawnbroking Acts supply machinery for the recovery of a pledged article on payment of its value, a claim for restitution of such an article cannot competently be brought in the J. P. Small Debt Court. Neither can aliment for an illegitimate child be recovered before the Justices, when sitting in the Small Debt Court, from a person who denies the paternity,—*Lindsay* v. *Barr*, 23 June 1826, 4 S. 748. It must therefore be kept in view that the Justices, when sitting as a Small Debt tribunal, may be unable to exercise a jurisdiction which, when sitting only as Justices under a particular Act, they have power to exercise. The reason of this is (1) that, as above pointed out, the Justices are a purely statutory body and have no common law jurisdiction, and must therefore walk strictly in terms of the Statute that confers on them the jurisdiction they are exercising; and (2) that the special Statute, other than the Small Debt Act, under which they have jurisdiction to try the case, may give the parties right as to appeal, recording of the evidence, use of written pleadings, presence of agents, &c., which the Small Debt Act withholds.

(*d*) Sections 3, 5, 7, &c. An outline of the mode provided will be found in § 8, p. 4.

(*e*) Where a party sued for payment of £5 under an account for £5, 15s., but against which credit was given for 15s. said to be already paid, the de-

fender brought a suspension of the decree on the ground that the Justices had had to decide on the merits of an account exceeding £5 in value. The Court however held that the Justices had not exceeded their powers,—*Fyfe* v. *Laing*, 8 Feb. 1823, 2 S. 197. See in further elucidation of this point note (*f*), p. 29.

Causes to proceed as in Schedule (A.) described.

3. And be it enacted, That all such causes shall proceed upon complaint [agreeable to the form in Schedule (A.) subjoined to the present Act, stating shortly the origin of debt or ground of action, and concluding against the defender (*a*);] and the Clerk of the Peace, or any deputy by him appointed, or, in case he shall fail to appoint one, the clerk to be appointed within the district, as hereinafter provided (*b*), shall adject to the said complaint, and on the same paper, a warrant signed by him (*c*), agreeable to the form in Schedule (A.) subjoined to the present Act; which warrant shall contain an authority to any constable or peace officer (*d*) for summoning the defender to appear and answer at the next meeting of the Justices of the Peace in the district (*e*) of the county or stewartry (*f*) where the defender resides (*g*), or where the meetings of the Courts are held weekly, then in the option of the pursuer, at the second or third diet of Court from the date of the warrant, the said diet of Court not being sooner, in either case, than upon the sixth (*h*) day after the date of the citation, and also for summoning witnesses (*i*), at the instance of either party, to the same day and place: Provided always, that a copy of the said complaint and warrant, with the citation annexed, agreeable to the said Schedule (A.) subjoined to this Act (*j*), and also a copy of the account, document of debt, or state of the demand (*k*), shall be delivered by a constable or peace officer to the defender personally, or left at his dwelling-place (*l*); [in which latter case, if the defender shall not appear at the diet of Court to which he has been cited, he shall be cited a second time personally, or at his dwelling-house or place of abode, upon the words *de novo* being either subjoined to the original complaint, and signed by any one Justice of the Peace, or written in the Procedure Book kept by the Clerk, and signed by the Justices or the Preses, to appear either at the next stated meeting, or at a meeting to be held by adjournment for that purpose, and fixed by the Justices

Warrant to issue.

Copy of complaint and warrant, citation, and account of debt, to be delivered to the defender.

In default of appearance, second citation, &c.

at the first diet, but which second meeting shall not be sooner than three days from the date of the first,] with certification that if he shall fail to appear at the diet of Court to which he is summoned [by this second citation,] he will be held as confessing the debt or justice of the demand (*m*): [Provided, that if the defender has been cited for the first time to a diet of Court, not sooner than twelve free days from the date of the citation, it shall be lawful for the constable or peace officer, in case the defender shall not have been personally found at the time of the first citation, to cite him a second time, either personally or at his dwelling-place, to the same diet of Court, on the authority of the original warrant, and without previously reporting an execution of the first citation of the Court, but always under this condition and limitation, that such second citation shall not be given sooner than upon the sixth day after the date of the first citation, nor later than upon the sixth before the diet of Court to which the defender is so cited for the second time;] and in case the defender shall not appear at the diet to which he is so cited [for the second time upon the same warrant,] he shall be held as confessed [in the same manner as if he had been cited personally, or cited at his dwelling-place upon a warrant *de novo* (*n*);] and the constable or peace officer shall in all cases return an execution (*o*) of citation signed by him, or shall appear and give evidence upon oath of his having duly cited the defender in manner aforesaid (*p*).

(*a*) These words within brackets were repealed by the Statute Law Revision Act of 1873,—36 & 37 Vict. cap. 91. By 12 & 13 Vict. cap. 34, sec. 1, it is provided "that all causes which her Majesty's Justices of the Peace in Scotland may competently hear, try, and determine under the authority of the said recited Act (6 Geo. IV. cap. 48), and this Act shall proceed upon complaint, to be signed by the Clerk or Depute Clerk of the Peace agreeably to the Form in Schedule (A.) hereunto annexed; and a copy of the complaint with citation thereon, and also a copy of the account, document of debt, or state of the demand, being delivered by a constable to the defender personally, or left at the dwelling-place of the defender, or, in the case of a company, at the ordinary place of business of the company, six days at least before the diet of Court mentioned in such complaint, shall be good and effectual to all intents and purposes, anything in the said recited Act requiring a second citation where the first citation had not been delivered per-

sonally, to the contrary notwithstanding." See the Act itself and notes thereto at the end of this Statute, p. 171. Practically the clause may be read as if all the words within brackets were omitted, and the rest of it recast.

On turning to Schedule (A.) of the Act quoted from it will be found that there is no requirement, as in Schedule (A.) to the Sheriff Small Debt Act (p. 92), that the summons shall specify the origin of debt, or ground of action. The effect of this legislation therefore is that the summons or complaint need only specify the amount claimed without referring to any account, &c.—*Henderson* v. *Wilson*, 18 Jan. 1834, 12 S. 313, 6 J. 196; but the account, document of debt, or state of the demand must be served on the defender. And as will be seen (note (*k*) *infra*) it is not necessary that the officer's execution bear that it was served.

As to the origin of debt, &c., see note (*c*), p. 32, and numerous illustrations on pp. 92 to 96.

(*b*) See sections 21 and 22.

(*c*) This warrant is not now necessary, and is by implication repealed by 12 & 13 Vict. cap. 34, sec. 4.

(*d*) Or enrolled law agent, if the citation be made under the Citation Amendment Act of 1882,—45 & 46 Vict. cap. 77, sec. 3. See more fully as to this mode of citation, note (*j*), p. 34.

(*e*) Under section 21 the Justices met in Quarter Sessions are authorised to divide the county into districts.

(*f*) See note (*a*) to the preceding section.

(*g*) As to what constitutes residence, and how long the domicile subsists, see §§ 22 and 23, p. 9. If the defender has no fixed residence, he may be cited to the Court of the district in which he is found; and jurisdiction may always be constituted, if the contract was made, and personal citation was given, within the district.

(*h*) *I.e.*, if the Court sits on the 7th, the citation must be given not later than the 1st.

(*i*) If any witness resides in another county the warrant will require to be indorsed by the Clerk or Depute-Clerk of the Peace of the county or district in which such witness resides,—12 & 13 Vict. cap. 34, sec. 3.

(*j*) The form for citation is now regulated by the Schedule to the Act 12 & 13 Vict. cap. 34, and by section 3 of the Citation Amendment Act of 1882. As to the former, see the end of this Act, and as to the latter, note (*j*) p. 34.

(*k*) But it is not necessary for the officer to state in his execution that a copy of the account, &c., was supplied to the defender,—*Thomson* v. *Allan*, 12 Feb. 1852, 14 D. 479, 24 J. 240. See Schedule (A.), and contrast with Schedule (A.) to 10 Geo. IV. cap. 55. See also note (*h*), p. 33.

(*l*) With a servant or inmate. Service by affixing a copy of the summons, citation, and account to the lockhole is also competent. An Execution of such service will be found at p. 98, and the rules applicable to it in note (*j*), p. 34; but the service is now better attained under the provisions of the Citation Amendment Act of 1882.

(*m*) Second citation is rendered unnecessary by 12 & 13 Vict. cap. 34, sec. 1.

(*n*) See note (*m*).

(*o*) The officer's function is to execute the warrant; his doing so is termed citation or intimation; and his report that he has done so is termed, not very aptly, his execution.

(*p*) The rules as to lockhole citation and citation under the Act of 1882 will be found detailed in note (*j*), p. 34.

Constable, &c., to cite witnesses, and to lodge a copy of citation in Clerk's hands.

4. And be it enacted, That where a constable or other peace officer shall be required by any party, whether pursuer or defender, to cite any persons as witnesses, he shall be obliged to lodge a written execution (*a*) of every such citation in the Clerk's hands, at or before the diet of Court to which the defender has been summoned, or otherwise to verify in Court (*b*) the execution of citation, as the Justices may see fit (*c*); and if the witnesses cited, either upon the one part or the other, do not appear at the time and place to which they are cited, it shall be competent to the party or parties to apply for a new warrant to compel their attendance at the next stated or adjourned meeting, which warrant may require them to attend in order to give evidence, under a penalty not exceeding twenty shillings sterling, to be awarded by the Justices of the Peace in case of their not appearing, unless a reasonable excuse be offered and sustained, which penalty shall be payable to the party at whose instance the witness was cited, and may be recovered by him in the same form and manner as herein directed with regard to other small debts (*d*); or in the option of the Justices, the witness so failing to appear after a second citation, and not sending a reasonable excuse which shall be sustained by the Justices, may be imprisoned for a certain time in the county prison (*e*), not exceeding ten days: Provided, that the aforesaid penalty shall not be awarded or recoverable, or the witness be liable to the said imprisonment, unless the second citation shall have been given not later than the sixth day before the diet of Court to which he has been cited.

Penalty on witnesses not attending.

(*a*) As to the meaning of execution, see note (*o*) to preceding section.

(*b*) See the last clause of the preceding section.

(*c*) Failure on the part of the officer to return an execution of citation will not prevent the witnesses being examined, if they are present; but if they are not, the second citation cannot be granted without habile proof that the first has failed. As to the party's remedy against the officer for loss caused by his failure to cite the witnesses, see section 9, p. 156.

(*d*) *I.e.*, he may sue for it. In the Sheriff Small Debt Court, if a witness does not appear at a diet to which he was cited forty-eight hours at least

beforehand, letters of second diligence may be granted under which the recalcitrant witness can be apprehended and kept in custody till the adjourned diet arrives; and such diet may be fixed for any day. See as to this and as to notice to the witnesses section XII., and notes (*e*) and (*f*), p. 50.

(*e*) The warrant might run thus,—"Glasgow, 7th January 1884. Her Majesty's Justices of the Peace for the Lower Ward of the Shire of Lanark, in respect that Robert Templeton, glazier, 48 Nelson Terrace, Glasgow, though duly cited to appear before them this day as a witness under a second citation, has failed to appear, or to send an excuse which they have sustained as reasonable: Therefore decern and adjudge the said Robert Templeton to be imprisoned for the space of five days, and thereafter to be set at liberty; and for that purpose grant warrant to officers of law to apprehend the said Robert Templeton and convey him to the prison of Glasgow, thereafter to be dealt with in due course of law."

When parties appear, Justices to hear them *vivâ voce*.

5. And be it enacted, That when the parties shall appear, the said Justices shall hear (*a*) them *vivâ voce*, and examine witnesses upon oath (*b*), and also the parties by declaration or upon oath: Provided always, that no procurator, solicitor, or any person practising the law, shall be allowed to appear or plead for them (*c*), either *vivâ voce*, or by writing, nor shall any of the pleadings, arguments, minutes, or evidence be taken down in writing, or entered on any record (*d*).

Practitioners of the law not allowed to plead.

(*a*) As to hearing the cause, see notes (*b*) and (*c*), pp. 51 and 52.

(*b*) By 28 & 29 Vict. cap. 9, sec. 2, it is provided that if any person "shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court . . . upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following: "I, *A. B.*, do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare that I will tell the truth, the whole truth, and nothing but the truth."

It is not necessary that the witness should hold up his hand, if he is averse to do so. But his declinature to take the oath must be from conscientious motives, and because of religious belief. Hence mere distaste for the solemnity of an oath cannot be accepted as a valid reason for not taking it. And if the person is either willing or unwilling to take the oath through absence of any religious belief, his oath or his affirmation cannot be received in any Court of Law in Scotland. The relaxation is made in favour only of persons whose sensitive, though perhaps misplaced, religious scruples lead them to hold that it is *unlawful* to take any oath. But, apart from their holding such a view, their evidence cannot be received in a Scotch Court of Law, unless given under the solemn sanction of the oath: if evidence be taken otherwise the decree may be set aside. It is quite possible they would tell the truth without being sworn, but so is it possible in regard to all witnesses; the witness may know he would, but nobody else does; and

while nothing will *ensure* that the truth will be spoken, the administration of an oath is found to be a very serviceable safeguard.

(*c*) A lawyer can of course appear for his own interest, or if the claim be assigned to him, see § 21, p. 8.

(*d*) In *Miller* v. *M'Callum*, 14 Nov. 1840, 3 D. 65, 13 J. 24, a decree of the Justices was suspended to which some of the objections were that a commission had been granted to take the evidence, and that it had been written down, and that lawyers had been allowed to appear. All this had been done of consent. By section XIII. of the Sheriff Small Debt Act, power is given to allow evidence to be taken by commission where a witness is unable to attend the Court: but no similar power is given by the present Act.

Defender not appearing, to be held as confessing the debt.

6. And be it enacted, That if a defender who has been duly cited, whether personally, or [by two (*a*) citations left] at his dwelling-house or place of abode, shall not appear in Court, either by himself, or by one of his family, or other person, not being in any case a legal practitioner or officer of Court, whom the Justices shall see reason in the circumstances of the case to hear on his behalf in the matter of the complaint, he shall be held as confessing the debt or justice of the demand, unless he shall by one of his family send an excuse which shall satisfy the Justices that a delay ought to be granted (*b*); in which latter case, or if the absence of witnesses, or any other good reason assigned (*c*), shall move the Justices to adjourn the cause to the next stated meeting, or other day to be specially appointed, it shall be competent for them to make such adjournment, and the parties and witnesses shall be ordered then to attend (*d*).

Justices may adjourn the cause.

(*a*) One is now sufficient,—12 & 13 Vict. cap. 34, sec. 1; see (*a*), p. 149.

(*b*) The regulations laid down by this and the succeeding sections amount to these: (1.) Where a pursuer's residence is twenty miles or upwards distant from the Court House he may appear on his own behalf, or by a member of his family, or by some one, other than a lawyer, holding a written mandate to appear for him. (2.) Where the pursuer's residence is not twenty miles distant from the Court House he may appear on his own behalf or by a member of his family. (3.) If appearance is not made, as above, by or for the pursuer, decree absolvitor must be granted to the defender if present or duly represented: and if neither party is present, nor duly represented, the case will be dismissed. (4.) A defender may appear to contest the case by himself, or by a member of his family, or by such person, other than a lawyer or an officer of Court, as the Justices may in the circumstances allow. (5.) A defender who is absent may, by a member of his family, apply for delay. (6.) If the defender is not present personally, or is not duly represented, or if delay is

refused to the person sent to ask it, decree in absence (notes (*b*) and (*e*) p. 55, and note (*c*), p. 157) must be granted to the pursuer. In this way a pursuer, who resides twenty miles or more from the Court, may, "if the Justices shall see fit," be represented by an officer of Court to whom he has granted a mandate. In the Sheriff Small Debt Court an officer of Court can in no case appear (section XV.)

(*c*) It is obviously inexpedient lightly to grant delay: to one party it may be unfair, and to the witnesses of both parties it may be oppressive. Unless a Court is systematically firm in refusing delay, except on solid grounds, parties and witnesses will not attend regularly, and will trust to an indulgence, whose unexpected refusal may cause disaster. See further on this point, and as to the policy of imposing an amand where an adjournment is granted, § 39, p. 17, and note (*g*), p. 55.

(*d*) In that event no further citation will be needed,—see note (*i*), p. 55.

Pursuer may be heard by one of his family.

7. Provided further, and be it enacted, That it shall be competent for the Justices, if they shall see reason in the circumstances of the case for so doing, to allow a pursuer or defender to be heard in the matter of his complaint or defence by one of his family; or if the pursuer shall not be resident nearer than twenty miles from the place where the Court is held, it shall be competent for the Justices, if they shall see fit, to hear him by a person holding a written mandate or authority from him for that purpose, the said mandatory not being a procurator, solicitor, or person practising the law (*a*).

(*a*) See note (*b*) to the preceding section. Age, illness, important business engagements, or the like may be accepted as sufficient reasons.

Where decree pronounced in absence of defender, he may obtain warrant sisting execution.

Matter in question may be reheard.

8. And be it enacted, That where a decree has been pronounced in absence of the defender (*a*), it shall be competent (*b*) for him, upon consigning the sum decerned for in the hands of the Clerk, at any time before the days of the charge (*c*) elapse, to obtain from the Clerk a warrant signed by him, sisting execution (*d*) till the next Court day, and containing an authority to cite the pursuer and witnesses for both parties; and the Clerk shall be bound to certify to the Justices at their said next meeting (*e*) the application for rehearing and the sist granted, which warrant so issued being served by a constable or other peace officer (*f*) upon the pursuer, either personally or [by two citations (*g*)] left at his dwelling-house or place of abode, in the manner provided in other cases by this Act, shall be

an authority for having the matter reheard at the next Court day (provided that the same shall not be sooner than the sixth day from the date of the personal citation given to the pursuer, or of the [second (*g*)] citation left at his dwelling-house or place of abode; or if the meeting of the Court shall be sooner than the sixth day from the date of such citation, then at the Court day next following): And provided always, that it shall be competent for the Justices to continue the sist granted in such cases from the first meeting of the Court after the application for a rehearing has been made, to such time as may be necessary for the appearance of the parties in order to be reheard (*h*); and in like manner, where absolvitor has passed in absence of the pursuer (*i*), it shall be competent (*j*) for him, at any time within one calendar month thereafter, upon consigning two shillings and sixpence in the hands of the Clerk, to obtain a warrant (*k*) signed by the Clerk, for citing the defender and witnesses for both parties, which warrant, being served by a constable or other peace officer upon the defender, either personally or [by two (*g*) citations] left at his dwelling-place, in the manner provided in other cases by this Act, shall be an authority for having the matter reheard at the next Court day, or Court day following, as hereby provided in the case of a rehearing at the instance of the defender; the two shillings and sixpence so deposited by the pursuer being in every case previously paid over to the defender.

(*a*) *I.e.*, where the defender has not appeared, or been represented, except to ask for a delay which has been refused, or has sent a representative whom the Court have disallowed,—*Hill* v. *Campbell*, 10 March 1824, 2 S. 790, the decree will be in absence, and may be sisted,—note (*b*), p. 55.

(*b*) It is in general his only course, and a reduction will not be allowed,—*Waddell* v. *Gilchrist*, 7 Dec. 1821, 1 S. 198; *Thomson* v. *Allan*, 12 Feb. 1852, 14 D. 479, 24 J. 240. See also note (*e*), p. 73, and section 14 of this Act, note (*e*), p. 160.

(*c*) When a decree is granted, an officer may be sent to leave a notice with the defender charging him to implement the decree within ten days. A Form will be found at p. 103.

(*d*) A Form of sist will be found at p. 144.

(*e*) *I.e.*, he will put it on the roll of causes.

(*f*) Or enrolled law agent,—45 & 46 Vict. cap. 77, sec. 3.

(*g*) Only one is necessary now,—12 & 13 Vict. cap. 34, sec. 2,—see note (*h*).

(*h*) In other words the Clerk grants a sist till the next meeting of the

Justices, and puts the case on the roll of that Court. If the parties appear the sist can be heard even although six days have not expired; but if one or both are absent, and six days have not elapsed from the date of the citation of the pursuer (not of the granting of the sist), the Justices will continue the sist to the next Court.

By 12 & 13 Vict. cap. 34, sec. 2, it is however enacted "That where a decree has been pronounced in absence of the defender, or where absolvitor has passed in absence of the pursuer, either before or after the passing of this Act, a copy of the warrant for rehearing being served upon the other party personally, or left at the dwelling-place of such party, in the manner and upon the inducíæ herein-before prescribed regarding the service of a complaint, shall be an authority for rehearing the cause."

(*i*) See note (*a*) *supra.*

(*j*) It is his only course, he cannot drop the old action and bring a new one,—*Flowerdew* v. *Bathie*, 4 July 1850, 12 D. 1178, 22 J. 524.

(*k*) The second Form in Schedule (A.) will be suitable, leaving out the clause as to service of the account, &c., unless it be desirable to have it served again.

Punishing constable for returning a false execution.

9. And be it enacted, That in case it shall be proved to the satisfaction of the Justices that the non-attendance of parties or witnesses has been occasioned by any failure of duty on the part of the constable or peace officer, it shall be in the power of the said Justices to punish him by a fine to the poor (*a*), or by imprisonment, the fine not exceeding twenty shillings sterling, or the imprisonment not exceeding ten days, reserving to the party injured any claim and recourse competent to him by law against the said constable or other officer for damage which he may have sustained by such neglect or violation of duty as aforesaid (*b*).

(*a*) See section 20.

(*b*) A similar provision will be found in section XXXIV. of the Sheriff Small Debt Act, p. 89.

Clerk or Depute Clerk to enter names and designations of parties, &c., in a book, according to the form in Schedule (B.)

10. And be it enacted, That the Clerk or Depute Clerk shall keep a book, wherein shall be entered the names and designations of the parties, and whether present in Court (*a*), or absent at the calling of the cause, the nature and amount of the claim, and date of giving it in, the mode of citation, the several deliverances or interlocutory orders of the Justices, and the final judgment or decree, with the date thereof, which last shall be signed by the Justices present, or by their Preses if more than two are present, the said entries by the Clerk being agreeable to the tenor of the

Schedule or Form marked (B.) annexed to the present Act, or with such addition to the said entries, as the Justices of the Peace in the several counties shall authorise and appoint, for the better and more regular despatch of the proceedings before them; and a copy of the said decree, containing warrant for arresting or poinding the effects of the defender, or for committing his person to prison (*b*), together with a particular note or statement of the expenses, in those cases where expenses have been awarded, as the same may have been incurred and are authorised by this Act, shall by the Clerk be annexed to the complaint, and on the same paper with it, the said copy of decree and warrant being conformable to the Schedule marked (A.) annexed to the present Act; which copy of decree and warrant, being signed by the Clerk or his deputy, and delivered to the party in whose favour the same is granted, shall be a warrant for execution, after the expiration of ten free days from the date of pronouncing the decree, if the party against whom it shall have been given was personally present in Court when it was pronounced, or had appeared by one of his family admitted to attend for him, or if he was not so present (*c*), execution shall only proceed after a charge (*d*) of ten free (*e*) days, to be given by the constable or peace officer, either by delivering a copy of the decree or judgment to the party personally, or leaving the same at his dwelling-house or place of abode, to which charge the constable or officer shall make oath, if required.

Decree and warrant, &c., to be made out conformable to Schedule (A.)

(*a*) It is desirable to note by whom the party is represented; for if the defender is represented by a person other than a member of his family, the decree, though it will be *in foro*, can only be enforced after a charge.

(*b*) The occasions on which imprisonment is competent will be found enumerated under note (*i*), p. 53.

(*c*) Hence a charge will be necessary (1) where the defender was absent and no appearance was made for him, (2) where he was represented by a person other than a member of his family, (3) where the Court refused to allow the representative to defend the case, and (4) where the defender sent a member of his family to ask for a delay which was refused,—see note (*a*), p. 155.

(*d*) As to the nature of a charge, see note (*c*), p. 155.

(*e*) There must be an interval of ten days between the charge and the execution; so, if the charge is given on the 1st, execution cannot proceed before the 12th.

Justices may award sums found due to be paid by instalments.

11. And be it enacted, That the said Justices may, if they think proper (*a*), direct the sum or sums found due to be paid by instalments, weekly or monthly, according to the circumstances of the parties found liable (*b*), and under such conditions or qualifications as they shall think fit to annex (*c*).

(*a*) See note (*a*), p. 60, as to when this is proper. The clause is verbatim the same as in the Sheriff Small Debt Act.

(*b*) See as to this note (*b*), p. 61.

(*c*) See note (*c*), p. 61.

Execution of poinding by constable to be summary.

12. And be it enacted, That the execution of the poinding by the constable shall be summary, by carrying the effects pointed to the nearest market town or kirk town or village within the parish, and after getting the same duly appraised (*a*), in the manner to be regulated by an order of the Justices for each county, at their Quarter Sessions, selling them between the hours of eleven and one of the clock at the cross or most public place, after one hour's notice given by a crier, by public roup, to the highest bidder (*b*), but reserving to the Justices, at their Quarter Sessions, if they shall see fit, to appoint a different hour for the sale, not being earlier than that above mentioned, or a longer notice to be given of the time of selling, and the overplus of the price, if there shall be any after payment of the sums decerned for, and the expenses, if expenses are awarded, including what is allowed by this Act for the poinding and sale, shall be returned to the owner (*c*), or if the effects are not sold, the same shall be delivered over at the appraised value to the creditor, to the amount of the debt and expenses, if expenses are awarded, including the allowance for poinding: Provided always, that in case the place of sale is not a market town, but only a kirk town or village, the place and time of sale shall be advertised two days at least before the day of sale, at the door of the parish church, on Sunday after the forenoon service.

(*a*) In an appraisement under a decree obtained in the Sheriff Small Debt Court the appraisers must be put on oath,—see note (*b*), p. 63. The appraisement must be reasonable and articulate,—not of the articles in slump,—see note (*h*), p. 39.

(*b*) At or above the appraised value,—not below it.

(*c*) If the owner cannot be found the overplus must, under a Sheriff Small Debt poinding, be consigned with the Sheriff Clerk. A similar course here would not be unreasonable.

In case of execution by poinding or imprisonment, constable to make a return to the Clerk.

13. And be it enacted, That in all cases of execution, by poinding or imprisonment, the constable or other officer to whom the execution is committed shall on or before the next Court day thereafter make a return or report (*a*) to the Clerk of Court, either in writing or verbally, as may be required by the Justices, of the date and manner of the execution, the number of assistants employed, and the sum or amount, if any, recovered since the date of the decree; and in case of a poinding, shall further state the value at which the goods were appraised, the place and times of sale, the charges paid for conveyance of goods and for warehouse room where these charges were incurred, and the price for which the goods were sold in cases where a sale was made; or if the execution was by imprisonment, he shall in his said report state the gaol in which the debtor was incarcerated, which particulars respectively, so reported by the constable or officer, shall be entered by the Clerk either in the Procedure Book or other books to be kept for that purpose, and be laid before the Justices at their meeting next after the said report shall have been made, and shall also be exhibited by him to any person desiring inspection of the same, for such fee as shall be allowed by order of the Justices, not exceeding sixpence for each time of inspection (*b*).

(*a*) The Sheriff Small Debt Act provides a Form for such a Report, which may be useful as an illustration,—see Schedule (G.), p. 113.

(*b*) If the officer fail to make his Report, or the Clerk to note the particulars and submit them to the Justices, the question is,—does this necessarily invalidate the proceedings? It is thought not, unless the party whose goods were poinded would be prejudiced by the poinding being sustained,—see note (*i*), p. 39. The Justices may deal with their erring officials as they think fit: it is in general only a question of discipline.

Decree of Justices not subject to advocation.

14. And be it further enacted, That the decree (*a*) given by the said Justices in any case competent to them by this Act shall not be subject to advocation (*b*), nor to any suspension (*c*), appeal, or other stay of execution, excepting

only in the case of consignation, as hereinbefore provided (*d*), for the purpose of a re-hearing before the Justices, nor shall be set aside or altered in an action of reduction before the Court of Session, on any other ground except that of malice and oppression (*e*) on the part of the Justices, nor shall any such action of reduction be at all competent after the expiration of one year from the date of the decree of the Justices.

(*a*) The decree is the entry made in the Court Book,—*Sinclair* v. *Rosa*, 25 April 1863, 35 J. 511, 4 Irv. 390; the writing on the summons given to the successful party, though often called the decree, is only the extract, or copy (as this Act terms it) of the actual decree. Hence it is the decree given by the Justices that is protected from review,—not what follows on it,—see on this notes (*a*) and (*e*), p. 72.

(*b*) Advocation was the step by which a process was taken from an Inferior to the Supreme Court. Under the Court of Session Act of 1868 appeal was substituted for it.

(*c*) Suspension is the means by which the enforcement of a decree by diligence is stopped. A bill of suspension is brought in the Bill Chamber of the Court of Session; and the decree or the diligence on it may be suspended by the Lord Ordinary on the Bills. In an appeal, the decree is affirmed, or varied, or recalled; in a suspension, it is not cut down, but enforcement of it is forbidden; in a reduction, the decree is cut down and declared to be now and to have been from the beginning null and void.

(*d*) Section 8, p. 154. If the decree can be sisted, that is the proper course, —see section 8, note (*b*), and § 27, p. 12.

(*e*) Malice and oppression must be expressly averred. These words have been fully explained,—p. 81; but in this Act they would probably be held to include corruption as used in the Sheriff Court Small Debt Act (p. 80), and apparently also deviation from the statutory provisions,—*Hill* v. *Campbell*, 10 March 1824, 2 S. 790. In that case the Justices had refused a sist of a decree in absence. So also where the witnesses were not put on oath, their decree was reduced,—*Home* v. *Henderson*, 24 May 1825, 4 S. 30. A variety of cases in which the Justices cannot competently exercise jurisdiction will be found enumerated in note (*c*), p. 147. But such cases as *Johnston* v. *Kellow*, 19 January 1803, F. C., Mor. 7634, and *Welsh* v. *Hendry*, 9 Feb. 1847, 9 D. 643, 19 J. 267, show that the Supreme Court will be chary of interfering with a decree of the Justice of Peace Small Debt Court. And it must be kept in view that a party is not in safety to let decree pass against him in absence, and then bring a suspension or a reduction on a ground which ought to have been stated either when cited before the Justices or by obtaining a rehearing if decree passed in absence. See section 8, notes (*b*) and (*j*), pp. 155 and 156, and §§ 26 and 27, pp. 12 and 13.

In case of a reduction being brought,

15. And be it enacted, That in case of a reduction being brought within that time (*a*), on the alleged ground of malice and oppression, the pursuer (*b*) shall, before the summons of

reduction is called, be obliged to find sufficient caution in the hands of the Clerk of Court (*c*), for payment of such expenses as may be awarded against him. pursuer to find sufficient caution.

(*a*) A year,—see the preceding section.
(*b*) *I.e.*, the pursuer of the action of reduction.
(*c*) This is an indispensable preliminary,—*Crombie* v. *Landale*, 23 Nov. 1833, F. C., 12 S. 122.

16. And be it enacted, That notwithstanding the provision of this Act, which requires all causes and complaints under the same to be heard, tried, and determined by two or more Justices of the Peace (*a*), nevertheless, in case no more than one Justice shall be present at the time and place appointed for a district meeting, it shall be lawful and competent for the said Justice, being then and there present, to hold a Court for the purpose of calling the roll of causes, of pronouncing decrees in absence, receiving returns of the executions of citations, and granting warrants for citation *de novo*, but for no other purposes; which decrees in absence so pronounced, and warrants *de novo* issued, shall be equally valid and effectual as if they had been granted and issued by two or more Justices then and there present. Cases in which one Justice may transact business.

(*a*) Section 2, p. 146.

17. And be it enacted (*a*), That the following and no other or higher fees shall be allowed to the Clerk and officers of Court; *videlicet*, Fees allowed to the Clerk and officers.

CLERK'S FEES (*b*).

From the pursuer:

For filling up and issuing the complaint, with warrant annexed for citing the defender and the witnesses on both sides	Sixpence.
For copy of the complaint and warrant, signed by the Clerk, for service on the defender	Sixpence.

For the first time of entering in the Procedure Book the names and designations of the parties, the nature and amount of the claim, and such other particulars as may be directed by the Justices	Sixpence.
For a warrant to cite, *de novo* . .	Fourpence.

From the defender:

For the first appearance of each defender (*c*),	Sixpence.

From the pursuer or defender (*as the case may be*):

For every oath of party . . .	One shilling.
For every oath of witness . . .	Fourpence.
For filling up and issuing a printed or other form of decree, with warrant of execution inserted therein . .	Sixpence.
For a rehearing, *videlicet;* for receiving consignation from a defender, or the sum appointed by this Act to be deposited by a pursuer, and granting certificate thereof; granting warrant to sist, and warrant for citation of party and witnesses; entry in the Procedure Book; filling up and issuing the decree when required, and paying over the said consignation or deposit	One shilling and sixpence.
For inspection of the book containing reports of executions by the constables, a fee	not exceeding sixpence each time, to be fixed by order of the Justices.

CONSTABLE'S OR OFFICER'S FEES (*d*).

From pursuer or defender (*as the case may be*):

For each citation, whether of a party or witness, with execution thereof . .	Fourpence.

For execution of an arrestment . .	Sixpence.
For execution of a poinding, including the appraisement, payment of assistants, and report of the execution, as required by this Act . . .	Three shillings.
For selling the goods poinded, including payment of assistants, and report of the sale, as required by this Act .	Two shillings.
For execution against the defender's person, including payment of assistants and report of the execution, as required by this Act	Three shillings.
For every mile which the constable or officer travels, in order to give a citation or execute a decree . . .	Fourpence.
And for each assistant, not exceeding two, where assistance is necessary .	Threepence.
But no allowance for travelling shall be received, either by the officer or by assistants, where the distance does not amount to a mile; and the allowance shall only be charged once to the same party for the whole distance actually travelled in any one day.	—

CRIER'S FEE.

For calling each complaint in Court .	One penny.

(*a*) The corresponding section to this in the Sheriff Small Debt Act is section XXXII. (p. 86), to which, and the notes thereto, reference may be made.

(*b*) Under 12 & 13 Vict. cap. 34, sec. 3, a fee of one shilling is payable for indorsation of a warrant or decree by the Clerk of the county in which it is to be enforced.

(*c*) In practice this fee is held to be exigible before the defender or his representative can be heard at all.

(*d*) Under the Citation Amendment Act of 1882, the fee for citing a party or witness is one shilling; for citing each witness after the first, *if for the same diet*, and for citing each party after the first, *if only one execution is necessary*, eightpence; and there is also the Post Office charge for registration and postage of letters. The above qualifying words in italics must be kept in view in fixing the expenses. Though citation in the old form is not abolished, no higher fees

than those allowed by the Act of 1882 are to be allowed, unless the Court "shall be of opinion that it was not expedient in the interests of justice that such service should be made in the manner herein before provided."

Abstract of table of fees to be printed upon each complaint. Table of fees to be hung up in Court-room, and Clerk's office.

18. And be it further enacted, That an abstract of the said table of fees shall be printed on each complaint, and on each copy of complaint for service, agreeably to the form marked, annexed to the present Act, or other form, to be settled by the Justices of the Peace; and a copy of the said table, signed by two of the Justices and by the Clerk, shall be suspended, and continued at all times in a patent situation in the Clerk's office, and in every Court-room or place for holding of Courts under authority of this Act; and the said fees shall be subject to modification by the Justices in very small cases, or where one complaint is directed against two or more defenders (*a*).

(*a*) Having regard to the increase in wages and prices, and the decrease in the value of money since 1825, when this Act was passed, and to the modifications in the statutory charges made by the Citation Amendment Act of 1882, this discretionary power will seldom have any need to be exercised.

Punishing officers exacting fees beyond the table.

19. And be it enacted, That if any Clerk or Depute Clerk of the Peace, or any constable or other officer, shall exact or take from any party, in a case of Small Debt, any fee not expressly authorised by this Act, or any higher rate of fee than is authorised hereby, the person so offending shall be liable to a penalty not exceeding, if he is a Clerk or Depute Clerk, the sum of five pounds for each offence, or if he is a constable or other officer, not exceeding the sum of twenty shillings for each offence; which penalties respectively shall be awarded by the Justices of the Peace, either at a Quarter Sessions or at a district meeting, on complaint, either written or verbal, from the party who has been aggrieved by such illegal exaction, and satisfactory proof thereof, and which penalties the Justices shall direct to be paid either to the party complaining or to the poor (*a*), or partly to both, as they may see fit, reserving always to the said Justices the power competent to them of farther punishing their officers by suspension or dismissal, for this as well as other acts of malversation in office.

(*a*) See section 20.

Clerk to keep an account of all fines awarded.

20. And be it enacted, That an account shall be kept by the Clerk of Court of all fines awarded by the Justices by virtue of this Act; and all such fines shall, where the application of them is not otherwise provided for and directed by this Act, be paid to the poor in such manner as the Justices shall direct.

Justices at Quarter Sessions to make divisions of county or stewartry into districts for purposes of the Act.

21. And be it enacted, That the Justices of the Peace for each county in that part of Great Britain called Scotland shall have power at any meeting of the Quarter Sessions, to make suitable divisions of the county or stewartry (*a*) into districts where not already done, or to alter the divisions already made, within which the Justices of the Peace shall meet at such stated times and places as the said Justices at their Quarter Sessions shall fix as most convenient, in order to carry the purposes of this Act into execution, and which meetings may be adjourned, if necessary, to any other lawful day or days, to be held at the same place; and of such divisions into districts, and of the stated times and places of meetings so to be appointed, or of the alterations of such divisions or stated meetings, where alterations are necessary, the Justices at their Quarter Sessions shall order due notice to be given to all concerned by advertisement at the church doors of every parish in the county or stewartry (*a*), at least two Sundays previous to the first stated meetings so to be appointed or altered.

Notice to be given.

(*a*) See section 2, note (*a*), p. 146.

In case Clerk of Peace shall not attend, Justices may appoint another.

22. And be it enacted, That in case the Clerk of the Peace shall fail to attend, either personally, or by a sufficient deputy, in any of the said districts at the meetings appointed by the said Justices, of which the said Clerk of the Peace has had due notice, the Justices who shall attend at such district meeting or meetings shall and they are hereby empowered to name an interim Clerk (*a*) for that district, who shall be removable by any subsequent Quarter Sessions, and another Clerk may then be appointed by the said Quarter Sessions from time to time, as they shall see cause.

(*a*) Such nomination might be in the following or similar terms: "Jedburgh, 1 April 1881.—Her Majesty's Justices of the Peace for the Upper District of the County of Roxburgh, met on said day, Nominate and Appoint Mr Archibald Douglas, Writer, Morebattle, interim Clerk of the Peace for said district, in terms of the twenty-second section of the Act 6 Geo. IV. cap. 48."

Justices empowered to make rules and orders for furtherance of the Act.

23. And be it further enacted, That for the better regulating the proceedings of the said Justices empowered to hear and determine the said causes (*a*), it shall and may be lawful to and for the Justices, at their Quarter Sessions, from time to time, to make such rules and orders as they shall find to be necessary and most conducive for carrying into effect the provisions and purposes of this Act, such rules and orders not being inconsistent with any of the express enactments or conditions herein contained, or otherwise contrary to law; and the said rules and orders having been made by the said Justices at their Quarter Sessions, shall be in force and kept and observed by the said Justices empowered to hear and determine the said causes, and their Clerks and officers, and the suitors before them, until the same shall be repealed or varied by the Justices at their said Quarter Sessions, or by the Lords of Session or Justiciary at Edinburgh, or by the Circuit Courts of Justiciary, on the application of any two or more Justices of the Peace.

(*a*) As in section 2, p. 146.

Persons summoned not to be exempt on account of privilege.

24. And be it enacted, That no person liable to be summoned by virtue of this Act shall be exempt from the jurisdiction of the said Justices on account of privilege, as being a member of any other Court of Justice (*a*).

(*a*) See note (*a*), p. 90.

Act not to extend to any debt where the title of lands is in question, or in cases of contract, &c.

25. Provided always, and be it enacted, That this Act or any thing herein contained shall not extend to any debt or demand where the title of any lands, tenements, or hereditaments, or where any heritable right whatsoever, is brought in question (*a*), nor to any other debt, matter, or thing that shall or may arise upon or concerning the validity of any will, testament, or contract of marriage, although the same

shall not amount to the sum of five pounds sterling; nor to any debt for any money or thing won at or by means of any horse-race, cock-match, or any kind of gaming or play (*b*), or any debt or demand for or on account of any spirituous liquors (*c*); any thing herein contained to the contrary in anywise notwithstanding.

(*a*) *I.e.*, is made matter of dispute, so that the case cannot be decided till the question of title is settled. But, if the title is not disputed, the action is quite competent,—*Thomson* v. *Boyd*, 25 Feb. 1824, F. C., 2 S. 735.

(*b*) Such debts cannot be recovered in any Court of Law; for that might require the Court to decide who won what is termed a *sponsio ludicra*, and Courts are not supposed to have time to give to such frivolous matters.

(*c*) Where a claim plainly embraced charges for spirituous liquors, as the payments made indefinitely to account were sufficient to extinguish these, it was held that the Justices' jurisdiction was not excluded,—*Murphy* v. *Reid*, 18 May 1839, 1 D. 788, 11 J. 464. And where the action was for payment of "goods," and thus was *ex facie* competent, and the defender did not appear before the Justices and so "confessed the justice of the demand," he was held not entitled to get the decree set aside on the ground that the goods were spirituous liquors,—*Welsh* v. *Hendry*, 11 Feb. 1847, 9 D. 643; 19 J. 267.

Constable not liable to penalty for selling by auction under this Act.

26. And be it enacted, That no constable or other officer of the peace, to whom execution of the decrees and warrants of the Justices in cases falling under the present Act may be committed, shall be liable to any penalty, fine, or punishment for selling goods or effects under authority of the said decrees and warrants, by public sale or auction, although such constable or peace officer may not be licensed as an auctioneer; any thing in the Act of nineteenth of George the Third, chapter fifty-six, or in any other Act or Acts for regulating sales by public auction, or imposing duties thereon, to the contrary in anywise notwithstanding.

No solicitor or procurator shall be capable to act as a Justice of the Peace.

27. And be it further enacted, That no solicitor or procurator in any Inferior Court in Scotland, or the partner of any such person, shall from and after the passing of this Act be capable to continue or be a Justice of the Peace, or act as such, in any county in Scotland, during such time as such solicitor, procurator, or partner of any such person shall continue in the business or practice of solicitor or procurator in any Inferior Court (*a*).

(*a*) By 19 & 20 Vict. cap. 48, sec. 4, it is enacted that any writer, solicitor, &c., elected a Magistrate or Dean of Guild in any burgh in which the holder of such office is *ex officio* a Justice of the Peace, may act as such Justice, if he intimate to the Clerk of the Peace for the county that he, and any partners in business he may have, will not practise in any Justice of Peace Court in the county during his tenure of office.

SCHEDULE (A.)

1. *Fees allowed by the Act* (*a*).

	s.	*d.*
CLERK'S FEES.		
Complaint warrant to cite	0	6
Copy for service	0	6
Entering into Procedure Book	0	6
For defender's appearance	0	6
For every oath of party	1	0
For every oath of witness	0	4
Decree and warrant of execution	0	6
Warrant *de novo*	0	4
Rehearing	1	6
For inspection of book	0	6
CONSTABLE'S FEES, including Assistants.		
Citation and execution	0	4
Execution of arrestment	0	6
Ditto of poinding	3	0
Sale	2	0
Imprisonment	3	0
Travelling expenses per mile, constable	0	4
Assistants, each	0	3
CRIER'S FEES.		
For calling	0	1

N.B.—The Justices strictly enforce the provision of the Act, which requires a copy of the account, document of debt, or state of the demand, to be delivered to the defender, at the time he is summoned.

(*a*) See section 17, p. 161, and notes.

2. *Complaint.*

[Unto the Honourable his Majesty's Justices of the Peace for the shire of

complains, That owing the complainer the sum of which refuses to pay unless compelled: Therefore the said defender

ought and should be decerned and ordained to make payment to the complainer of the aforesaid sum of with expenses (*a*).]

(*a*) This Form is repealed by the Statute Law Revision Act of 1873,—36 & 37 Vict. cap. 91; and is replaced by the Form (*infra*, p. 173) provided by 12 & 13 Vict. cap. 34.

3. *Warrant of Citation.*

[At the day of the Clerk of Peace for the shire of grants warrant for summoning the said defender to compear before the Justices of the Peace for the said shire at , in the Court House thereof, upon the day of at o'clock, to answer at the instance of the said complainer; and appoints a copy of the account pursued for, document of debt, or state of the demand, to be delivered to the defender along with the citation; also grants warrant for citing witnesses for both parties to compear at same place and date, to give evidence in the said matter (*a*).]

C. D., Clerk.

(*a*) This is practically repealed and replaced by the Form (*infra*, p. 173) provided by 12 & 13 Vict. cap. 34.

4. *Execution of Citation* (*a*).

Upon the day of One thousand eight hundred and I constable, summoned the above designed , to compear before his Majesty's Justices of the Peace, time and place above mentioned, to answer at the instance of the complainer, with certification that will otherwise be held as confessing the debt. This I did by a full copy of the before complaint and warrant, with a short copy of citation thereto subjoined. *A. B.*, Constable.

(*a*) Several Forms for Executions will be found at pp. 97, 98, 140, and 142. The Forms to be adopted under the Citation Amendment Act will be the same both in the Sheriff and the Peace Small Debt Courts. The other Forms are so analogous that it is superfluous to reprint them here. It will be noticed that 12 & 13 Vict. cap. 34 assimilates the Forms for Complaint and Citation to those provided by the Sheriff Small Debt Act,—see pp. 173 and 174.

5. *Extract Decree for Pursuer* (*a*).

At the day of
One thousand eight hundred and years, the which day his Majesty's Justices of the Peace for the county of found and hereby find the within designed defender liable to the also within designed pursuer, in the sum of with of expenses, as herein below marked and decerned and ordained, and hereby decern and ordain instant execution by arrestment, and also execution to pass hereon by poinding and imprisonment [if the same be competent,] after free days.

C. D., Clerk.

(*a*) The decrees themselves are written in the Court Book, and are mere jottings,—*e.g.*, Dismisses: Decerns for 18s. 6d. and expenses: Decerns less principal sum paid: Decerns less 2s. paid: Decerns for 15s., payable 1s. per week. See also the remarks made by the Judges in deciding *Flowerdew* v. *Bathie*, 4 July 1850, 12 D. 1178, 22 J. 524; and notes (*c*), p. 60; (*f*), paragraph 11, p. 79; and (*a*), p. 160.

SCHEDULE (B.)

Numbers.	Date of Complaints.	Pursuers.	Defenders.	Sums.	How due.	How cited.	By what Constable.	Interlocutors and Decrees.

N.B.—After the name of each pursuer and defender, let the letter P. or A. be added, in order to mark whether the party was *present* or *absent* when the cause was called; let expenses be also entered under the head of Interlocutors (*a*).

(*a*) See section 10, note (*a*), p. 157. See also note (*a*), p. 113; and observe (p. 157) the Justices have powers as to additional entries similar to those of the Sheriff.

12 & 13 VICTORIA, CAP. 34.

An Act to amend an Act regulating the Justice of the Peace Small Debt Courts in Scotland.—[13th July 1849.]

WHEREAS an Act was passed in the sixth year of the reign of his Majesty King George the Fourth, intituled *An Act to alter and amend an Act passed in the Thirty-ninth and Fortieth Year of King George the Third, for the Recovery of Small Debts in Scotland,* and it is expedient that the said recited Act should be amended: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That all causes which her Majesty's Justices of the Peace in Scotland may competently hear, try, and determine under the authority of the said recited Act (*a*) and this Act shall proceed upon complaint, to be signed by the Clerk or Depute Clerk of the Peace agreeably to the Form in Schedule (A.) hereunto annexed; and a copy of the complaint with citation thereon, and also a copy of the account, document of debt, or state of the demand (*b*), being delivered by a constable to the defender personally, or left at the dwelling-place of the defender (*c*), or, in the case of a company, at the ordinary place of business of the company, six days at least (*d*) before the diet of Court mentioned in such complaint, shall be good and effectual to all intents and purposes, anything in the said recited Act requiring a second citation where the first citation had not been delivered personally, to the contrary notwithstanding (*e*).

6 Geo. 4. c. 48.

Form of complaint and mode of execution, and one citation to be good without a second citation.

(*a*) See note (*c*), p. 147.

(*b*) See various examples of these at pp. 92 to 96.

(*c*) As to lockhole citation and citation under the Citation Amendment Act of 1882, see note (*j*), p. 34.

(*d*) *I. e.*, If the Court is to sit on the 8th, the defender cannot be cited after the 1st.

(*e*) *I. e.*, a pursuer shall be entitled to decree in terms of the certification in the complaint, if the defender does not appear though cited only once and not

personally. The recited Act only allowed such a result if the defender had been cited personally, or a second citation had been left at his house for him.

Causes in which decrees in absence have been pronounced may be reheard on the like service and induciæ.

2. And be it enacted, That where a decree has been pronounced in absence (*a*) of the defender, or where absolvitor has passed in absence of the pursuer, either before or after the passing of this Act, a copy of the warrant for rehearing (*b*) being served upon the other party personally, or left at the dwelling-place of such party, in the manner and upon the induciæ herein-before prescribed (*c*) regarding the service of a complaint, shall be an authority for rehearing the cause (*d*).

(*a*) See this explained, note (*a*), p. 155.

(*b*) Or as it is commonly termed the "sist,"—see section 8, *ante*, p. 154.

(*c*) See the preceding section.

(*d*) These new provisions are not to be held as altering the provisions as to consignation by the pursuer of half-a-crown, and its award to the defender, or by the defender of the sum decerned for.

Warrant or decree issued in one county may be enforced in another, if indorsed, &c.

3. And be it enacted, That any warrant or decree to be obtained in any such cause as aforesaid may be enforced by a constable either in the county in which the same has been issued, or in any other county or counties (*a*); provided that, when enforced in any other county, the warrant or decree or extract thereof shall first be indorsed by the Clerk or Depute Clerk (*b*) of the Peace of such other county, who is hereby required to make such indorsement (*c*) on payment of a fee not exceeding one shilling.

(*a*) The action has to be raised in the county, or district where the defender resides. But the pursuer may live in another county, and, if he obtains decree in absence, a warrant for rehearing may have to be served on him. Or witnesses or havers may reside in a different county from the defender. In these cases the warrant of service will require to be indorsed.

(*b*) The proper party to apply to is the Clerk or Depute Clerk of the district in which the defender resides.

(*c*) Indorsed, in terms of the Statute, by me, Clerk of the Peace of the County of, &c.; *or*, Indorsed in terms of the Statute.

A. B.,
J. P. Clerk of Barsetshire.

Recited Act continued except as hereby altered.

4. And be it enacted, That the said recited Act shall continue in full force and effect, excepting in so far as the same is hereby altered and amended.

SCHEDULE (A.)

1. *Summons or Complaint.*

No.

The Honourable her Majesty's Justices of the Peace for the shire [*or* stewartry] of

To officers of Court, jointly and severally.

Whereas it is humbly complained to us by *C. D.* [*designation* (*a*)] that *E. F.* [*designation* (*a*)], defender, is owing to the complainer the sum of (*b*) which the said defender refuses or delays to pay; and therefore the said defender ought to be decerned and ordained to make payment to the complainer with expenses: Therefore it is our will, that on sight hereof ye lawfully summon the said defender to compear before us, or any two or more of us in the at upon the day of at of the clock noon, to answer at the complainer's instance in the said matter, with certification, in case of failure, of being held as confessed; requiring you also to deliver to the defender a copy of any account, document of debt, or state of the demand pursued for (*c*); and that ye cite witnesses and havers for both parties to compear at the said place and date (*d*), to give evidence in the said matter as accords of law.

Given under the hand of the Clerk of Court, at the day of Eighteen hundred and years.

J.P., Clerk,
[*or* Depute Clerk.]

(*a*) See as to the designation of parties, §§ 24 and 25, pp. 9 to 12, and note (*a*), p. 92.

(*b*) This Act, unlike the Sheriff Small Debt Act, does not require that the *summons* shall disclose anything as to the ground of action or origin of debt or date of it. See section 3, note (*a*), p. 149.

(*c*) As regards the necessity of this, see note (*h*), p. 33.

(*d*) Unfortunately the provisions of this Act abolishing second citation of parties are not extended to witnesses,—see section 1, p. 171.

2. *Citation for Defender.*

E. F., defender above designed, you are hereby summoned to appear and answer before the Justices in the matter, and at the time and place, and under the certification set forth in the above copy of the complaint against you.

This notice served upon the day of by me,

J. T., Constable.

SUPPLEMENTARY MATTERS.

1. *Affirmation.*
See note (*b*), p. 151.

2. *Appointment of Interim Clerk.*
See note (*a*), p. 166.

3. *Decrees.*
See note (*a*), p. 170.

4. *Indorsations of Warrants and Decrees.*
See note (*c*), p. 172.

5. *Justice of Peace Small Debt Courts* (*a*).

ARGYLL	Tobermory.
AYR	Ayr.
	Girvan.
	Kilmarnock.
	Saltcoats.
	Cumnock.
	Irvine.
	Largs.
	Beith.
	Maybole.
BANFF	Buckie.
	Cullen.
CAITHNESS	Wick.
	Thurso.
DUMFRIES	Dumfries.
	Annan.
EDINBURGH	Edinburgh.
	Do. for County of City.
	Dalkeith.
FORFAR	Dundee.
	Arbroath.
	Montrose.
	Brechin.
INVERNESS	Inverness.
	Grantown.
LANARK	Airdrie.
	Hamilton.
	Glasgow.
RENFREW	Paisley.
	Greenock.
	Port-Glasgow.
	Lochwinnoch.
ROSS	Ullapool.
	Lochalsh.
STIRLING	Stirling.
WIGTOWN	Stranraer.
	Newton-Stewart.

(*a*) The above list comprises the towns at which, according to the Judicial Statistics for the year 1882, Small Debt cases were raised in the Justice of Peace Courts during that year. But there are about seventy other places at which sittings may also be held; though, as regards most of them, such sittings seem to have been for some time more or less in abeyance.

6. *Oath.*

I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth.

7. *Citation of Witnesses, &c. &c.*

As the two Forms (pp. 173, 174) supplied by the Act are adapted from those given in Schedule A. to the Sheriff Small Debt Act, any other Forms provided here would similarly be adaptations of those already given (pp. 97 to 100). The modifications are so slight as not to justify reprinting them here. The only matter worth pointing out is, that the citation of a witness or haver will not be "under the penalty of forty shillings" but "under the penalties expressed in the Act, 6 George IV. cap. 48."

8. *Warrant of Committal of Witness.*

See note (*e*), p. 152.

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